reliability . . . it may still support a finding of reasonable suspicion if sufficiently corroborated through independent police investigation.") (citation omitted).

Here, Ms. Myerson's tip had sufficient indicia of reliability because she went to college with the defendant, worked with him, and heard him threaten to use his firearm. Op. 5–6. In addition, Officer Maisel corroborated Ms. Myerson's tip when he saw a vehicle with a Ben & Jerry's bumper sticker and a University of Vermont sticker in the window enter Oakledge Park. Therefore, the totality of the circumstances indicates that Ms. Myerson's tip as corroborated by Officer Maisel established reasonable suspicion.

CONCLUSION

For these reasons, this Court should affirm the district court's denial of the defendant's motion to suppress.

Applicant Details

First Name	**Luke**
Middle Initial	**D**
Last Name	**Yamulla**
Citizenship Status	**U. S. Citizen**
Email Address	**ldy2103@columbia.edu**
Address	**Address** Street **5726 Long Lane** City **DOYLESTOWN** State/Territory **Pennsylvania** Zip **18902** Country **United States**
Contact Phone Number	**5709260013**

Applicant Education

BA/BS From	**University of Pennsylvania**
Date of BA/BS	**May 2020**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 15, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Gender and Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Williams Institute Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Gomez, Gregory
ggomez@ndsny.org
Genty, Philip
pgenty@law.columbia.edu
212-854-3250
Greene, Jamal
jamal.greene@law.columbia.edu
212-854-5865

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Luke Yamulla
5726 Long Lane, Doylestown, PA, 10027
(570) 926-0013
LDY2103@columbia.edu

June 1, 2023

The Honorable Juan R. Sánchez
United States District Court,
Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street, Courtroom 14-B
Philadelphia, PA 19106

Dear Chief Judge Sánchez,

I am a 2023 Harlan Fiske Stone graduate of Columbia Law School and a 2020 summa cum laude graduate of the University of Pennsylvania. I write to enthusiastically apply to serve as your law clerk for the 2024 term or any term thereafter. I am currently committed to begin this fall as a litigation associate at Dechert LLP in Philadelphia. After spending a year gaining experience at the firm, it would be my privilege to offer service to your Honor and the public as a law clerk of the Eastern District. I am confident that a clerkship would, in the long term, prepare me to be the best litigator I can be.

My experience at the Neighborhood Defender Service of Harlem (NDS) has prepared me well to serve in federal district court. I have conducted extensive legal research into various criminal law matters and am very familiar with criminal court procedures. I also have experience working on various civil matters such as civil rights, employment, and corporate litigation from my work at Mazzoni Center Legal Services and Dechert. I am confident that I would contribute meaningfully to your chambers from day one.

Enclosed please find my resume, transcript, and writing sample. Following separately are letters of recommendation from Professors Jamal Greene (jkg2118@columbia.edu, 212-854-5865), Philip Genty (pgenty@law.columbia.edu, 212-854-3250), and my NDS supervisor, Gregory Gomez (ggomez@ndsny.com, 646-565-8731).

Thank you for your consideration. I hope we may have the opportunity to meet.

Respectfully,

Luke Yamulla

Luke Yamulla
(570)926-0013 | ldy2103@columbia.edu
5726 Long Lane
Doylestown, PA 18902

Education

Columbia Law School, New York, New York
J.D., Received May 2023
Honors: Harlan Fiske Stone Scholar
Activities: *Columbia Journal of Gender & Law*, Staff Editor
Williams Institute Moot Court, Participant and Student Editor

University of Pennsylvania, Philadelphia, Pennsylvania
B.A., *summa cum laude*, Received May 2020
Major: Philosophy, Politics, and Economics (PPE)
Minor: Psychology

Lafayette College, Easton, Pennsylvania, 2016-2017

Experience

Neighborhood Defender Service of Harlem, New York, NY
Legal Extern Sept. 2022- May 2023
Two-semester externship at a public defender's office. Conducted extensive legal research on various state and federal evidentiary issues, criminal procedure issues, and substantive criminal law. Edited various pre-trial motions and briefs submitted to the Manhattan Criminal Court. Argued arraignments and other pre-trial hearings before Manhattan Criminal Court judges. Managed misdemeanor cases.

Dechert LLP, Philadelphia, PA
Summer Associate (offer extended) May 2022- July 2022
Summer associateship at a global law firm. Assisted with both litigation and transactional matters. Prepared memoranda addressing various state and federal evidentiary, procedural, and substantive legal issues in complex commercial litigation, anti-trust, and civil rights matters. Assisted transactional attorneys with due diligence, research into SEC requirements, and debt agreement drafting. Received extensive Westlaw and Lexis training.

Mazzoni Center Legal Services, Philadelphia, PA
Legal Intern May 2021- July 2021
Summer internship at a legal services organization. Assisted with legal representation of low-income LGBT people in Philadelphia. Conducted legal research on various state and federal civil rights, employment, housing, and family law matters. Drafted court petitions and suggested orders. Met with clients and gathered relevant information. Conducted judgment searches.

University of Pennsylvania, Philadelphia, PA
Research Assistant to Dr. Daniel Gillion, Political Science Department Sept. 2017- Jan. 2020
Copy-edited Dr. Gillion's book and articles. Wrote literary reviews on various political science topics. Performed statistical analysis with R and Microsoft Excel.

INTERESTS: Skiing, theater, my wonderful dog Olivia

Columbia Law School

Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

05/31/2023 14:55:16

Program: Juris Doctor

Luke D Yamulla

Spring 2023

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A-
L6656-1	Ex. Neighborhood Defender Service of Harlem Community Defense	Fontier, Alice	2.0	CR
L6656-2	Ex. Neighborhood Defender Service of Harlem Community Defense - Fieldwork	Fontier, Alice	2.0	CR
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	A-
L8072-1	S. Advanced Constitutional Law: Reading the Constitution	Amar, Akhil	2.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6231-2	Corporations	Goshen, Zohar	4.0	A-
L6656-1	Ex. Neighborhood Defender Service of Harlem Community Defense	Fontier, Alice; Jackson, Danielle	2.0	CR
L6656-2	Ex. Neighborhood Defender Service of Harlem Community Defense - Fieldwork	Fontier, Alice; Jackson, Danielle	2.0	CR
L6169-1	Legislation and Regulation	Bulman-Pozen, Jessica	4.0	B+
L6672-1	Minor Writing Credit	Greene, Jamal	0.0	CR
L8661-1	S. Supreme Court	Allon, Devora Whitman; Lefkowitz, Jay	2.0	A-

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6109-1	Criminal Investigations	Livingston, Debra A.	3.0	A-
L6625-1	Journal of Gender and Law		0.0	CR
L6474-1	Law of the Political Process	Greene, Jamal	3.0	A-
L6781-1	Moot Court Student Editor II	Bernhardt, Sophia	2.0	CR
L6274-1	Professional Responsibility	Meyer, Janis	2.0	A
L8516-1	S. Election Law for Civil Rights Lawyers	Perez, Myrna	2.0	A
L6822-1	Teaching Fellows	Bernhardt, Sophia	1.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6942-1	Comparative Criminal Justice	Davis, Frederick	2.0	A
L6242-1	Environmental Law	Gerrard, Michael	3.0	A-
L6241-1	Evidence	Shechtman, Paul	3.0	A-
L6256-1	Federal Income Taxation	Schizer, David M.	4.0	A-
L6625-1	Journal of Gender and Law		0.0	CR
L6681-1	Moot Court Student Editor I	Bernhardt, Sophia	0.0	CR
L6674-1	Workshop in Briefcraft [Major Writing Credit - Earned]	Bernhardt, Sophia	2.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-2	Constitutional Law	Hamburger, Philip	4.0	B+
L6108-2	Criminal Law	Harcourt, Bernard E.	3.0	A
L6130-5	Legal Methods II: Methods of Persuasion	Genty, Philip M.	1.0	CR
L6121-31	Legal Practice Workshop II	Sherwin, Galen L.	1.0	P
L6116-1	Property	Scott, Elizabeth	4.0	CR
L6183-1	The United States and the International Legal System	Waxman, Matthew C.	3.0	A-
L6874-1	Williams Institute Moot Court	Sherwin, Galen L.; Strauss, Ilene	0.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-5	Civil Procedure	Genty, Philip M.	4.0	B+
L6105-1	Contracts	Kraus, Jody	4.0	CR
L6113-2	Legal Methods	Strauss, Peter L.	1.0	CR
L6115-20	Legal Practice Workshop I	Kreiner, Evan Ross; Whaley, Hunter	2.0	P
L6118-4	Torts	Underhill, Kristen	4.0	B

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 85.0

Total Earned JD Program Points: 85.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2022-23	Harlan Fiske Stone	3L
2021-22	Harlan Fiske Stone	2L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	2.3

NDS HARLEM

NEIGHBORHOOD DEFENDER SERVICE

May 26, 2023

Re: Letter of Recommendation on Behalf of Luke Yamulla

To Whom it May Concern:

I am a Supervising Attorney at the Neighborhood Defender Service of Harlem, a holistic, client-centered public defense office located in Harlem, New York City. Through our partnership with Columbia Law School's Criminal Defense Externship, I had the opportunity to supervise Luke Yamulla while he was an extern at my office throughout the entirety of the 2022-2023 school year.

I have been practicing for nearly twenty years at various public defender organizations and in private practice. I have worked with countless law school students in that time. I can see without question that Luke would be an exemplary clerk. His attention to detail, keen legal acumen, skillful writing ability, and care for clients demonstrate he is an ideal candidate for the position. I highly recommend him.

As public defenders, our clients do not retain us. Rather, we take on any matter that is brought into the criminal legal system. As such, our cases may involve extremely difficult issues and tasks coupled with clients who come to us with extreme trauma, challenging life experiences, and severe mental health concerns.

I observed Luke handle such tough situations. He was able to expertly navigate his clients through the complexities of the criminal legal system, while being in tune and cognizant of their particular needs. When meeting with clients and reading their case files, Luke was able to quickly evaluate what areas of the prosecution's case were legally insufficient and knew the right questions to ask our clients to evaluate potential defenses. He could immediately issue spot aspects of the case that needed further attention and evaluation, including legal research, specific motions, further investigation, or referrals for social work needs or other collateral needs, like immigration or civil concerns.

During his representation, Luke's character as a diligent and caring advocate was evident. I was able to observe Luke showing genuine concern for his clients and helping them deescalate tense situations. For example, one client had a long history of mental illness and was forced into homelessness by his arrest. Luke impressed with the care he had for the client and the sensitivity he showed for his situation. Luke demonstrated a welcomed level of commitment and work ethic in this situation.

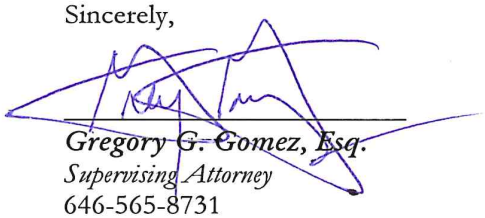
317 Malcolm X Boulevard, 10th Floor, New York, NY 10027
Tel: 212.876.550 I Fax: 212.876.5586 I www.NeighborhoodDefender.org

In addition, I was able to observe Luke advocate for our clients on the record. For example, when Luke argued at a pretrial hearing for this client under my supervision, his concern and investment in the case shined through. He was well prepared, and even though the relief requested was rarely granted, Luke did not get discouraged. He was also able to handle last minute contingencies and think quickly on his feet. I also supervised him on various bail applications. Again, Luke exceeded expectations by being a zealous advocate for our clients and he showed a strong ability to orally advocate on the record.

I also assigned Luke many legal research projects. When evaluating potential arguments, Luke consistently anticipated prosecution arguments and could also assess the persuasiveness of our arguments. For example, I asked Luke to write a memorandum on arguments we could make to exclude a DNA sample collected in connection with a previous New York Youthful Offender conviction. Luke's memo on this topic comprehensively addressed the prosecution's anticipated responses and legal concerns the court would want addressed. His ability to review precedent, distinguish cases, and reach appropriate legal conclusions was apparent.

In sum, it was a pleasure to have Luke as a legal extern. I am certain he would make an exceptional clerk. Should you have any additional questions about Luke or his time here, I would be happy to discuss further.

Sincerely,



Gregory G. Gomez, Esq.
Supervising Attorney
646-565-8731
ggomez@ndsny.org

June 02, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write to recommend Luke D. Yamulla, a 2023 graduate of Columbia, for a judicial clerkship. I met Mr. Yamulla in his very first semester of law school in Fall 2020, when he was enrolled in my Civil Procedure course. His class met entirely in person, the only non-virtual class his cohort had that semester. It was a small section of approximately 30 students, spread out in a classroom designed for 180 and masked. Although it was initially challenging to teach in this setting, it was ultimately a rewarding experience for me. Because of the regular twice-weekly in-person contact, I was able to get to know this group of students well and have stayed in contact with many of them.

Mr. Yamulla was fully engaged in the classroom and in our (virtual) office hours. He was an active participant in class discussions, offering perceptive comments that showed he had read and thought carefully about the assigned class materials. He also worked well with his classmates in the small group discussions that were a regular part of the class. It was a pleasure to have him as a student in this course.

I was therefore happy that Mr. Yamulla enrolled in my intensive course, Legal Methods II: Methods of Persuasion, in January and February 2021. Legal Methods II is, as the name suggests, the second part of a required first year course, which is taught at the beginning of each semester.1 The curriculum for Legal Methods I is uniform and serves as an introduction to legal studies. For Legal Methods II, the students select from a menu of offerings. My course provides an introduction to the persuasive techniques that are at the core of a lawyer's work. Many of the students in the course have been chosen to participate in one of our specialized moot court programs in the spring and want to use my course as preparation for that experience. Mr. Yamulla was one of these, having been selected for the Gender and Sexuality Moot Court.

As in Civil Procedure, Mr. Yamulla was a frequent participant in class discussions, and collaborated well with his fellow students, both in the interactive morning classes and in the afternoon small group sessions with my teaching fellows. His writing was also strong. He prepared a series of essays reflecting on each of our classes, and these exhibited the same expressiveness and insight I had observed in his work for Civil Procedure. For his final class project, he participated in a group presentation based on issues in his assigned moot court problem, and he also submitted a well-crafted essay reflecting on the presentation.

This final essay complemented nicely Mr. Yamulla's work throughout the course. A focus of his was the challenge of persuading an audience whose political and world views differ from one's own. In his essay he discussed the importance of trying to find shared values with the audience and using these as a basis for connection and, ultimately, persuasion. I was impressed both by his commitment to his deeply-held principles and by his sincere desire to find common ground with those who might not initially agree with him. These are qualities I have admired in Mr. Yamulla over the time I have known him.

The excellence of Mr. Yamulla's academic work extended beyond my courses. Although his grades were good in his first year (a mix of A, A-, B+, and B), his performance really took off after that. He earned honors as a Harlan Fiske Stone Scholar in his second and third years for overall achievement. He was also selected for membership on the Columbia Journal of Gender and Law.

In addition to his academic accomplishments, Mr. Yamulla was a valuable institutional citizen within the law school. As noted, he was chosen for the Gender and Sexuality Moot Court in his first year, and he became a Student Editor in his second. In that role he mentored and provided feedback to the first year students in the program, guiding them through their briefwriting and preparation for oral argument. He also volunteered to participate in the hiring of a new instructor for the classroom component of that moot court. Because I oversee our experiential program, I participated in the selection interview Mr. Yamulla and other students conducted with this individual. I was impressed, but not surprised, by Mr. Yamulla's careful preparation and thoughtful questioning.

On a more personal level, I will note that Mr. Yamulla grew up in rural Pennsylvania. His transition, first to Philadelphia after his first year at Lafayette College in Eaton, and then to New York City, required a good deal of drive, courage, and self-reliance. He is a person who takes nothing for granted.

In short, Mr. Yamulla has outstanding intellectual abilities and is highly motivated and principled. He also works extremely well in collaborative settings. I believe that he would make valuable contributions to your work and that you would enjoy having him as a colleague in your chambers. For all of these reasons, I am delighted to recommend him to you.

Please contact me if you need any additional information.

Sincerely yours,

Philip M. Genty

Philip Genty - pgenty@law.columbia.edu - 212-854-3250

Vice Dean for Experiential Education
Everett B. Birch Clinical Professor
in Professional Responsibility
212-854-3250
pgenty@law.columbia.edu

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1 *For the 2021 course, I was forced to move from in-person teaching to a more complicated "hybrid" modality in which some students were in the classroom and others were online. In addition, because our normal academic calendar was disrupted, the course shifted that year from an intensive week at the beginning of the semester to five weekly classes in January and February.*

Columbia Law School

June 02, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: ***Recommendation for Luke Yamulla***

Dear Judge Sanchez:

I write to offer my unconditional support for Luke Yamulla's application to clerk in your chambers. Luke is a terrific young lawyer and human being who would be an asset to any judicial chambers.

My interactions with Luke are in two capacities. I first encountered him when he enrolled in my 126-student Law of the Political Process class in the spring of 2022, during his 2L year. Law of the Political Process is a conceptually rigorous election law class that immerses students in the constitutional and statutory doctrine around voting rights, rights of political association, districting and gerrymandering, and campaign finance. The course was extremely demanding. It required advanced competence in constitutional law, comfort with interpretation of several complex statutes, an ability to navigate confusing and self-contradictory case law with Byzantine factual records, and the agility to move back and forth between the highly conceptual and the highly specific. Students reported the workload as unusually heavy for a three-credit course.

Luke excelled in the course. Despite the large size of the class, I came to know him quite well, as he was not a shrinking violet in class and he regularly attended and asked questions at office hours. I do not recall a single lecture to which Luke was not prepared to offer constructive contributions. This speaks both to his preparation and to his immense curiosity. Luke is an intellectually serious person who brings both a sharply analytic mind and a charming earnestness to discussions of law (and much else, I imagine, though we have mostly talked law). Unsurprisingly, Luke distinguished himself on the course exam as well, scoring in the top fifth of exams in a course with a great many students who self-selected into the course due to past professional experiences or deep ambitions in election law.

My second interaction with Luke was as an advisor to his excellent student Note on the evolution of "animus" doctrine from cases involving LGBTQ+ rights to those involving the rights of religious minorities. Luke's approach to the Note surfaced the skills he will bring to chambers: he was self-motivated and required no hand-holding in developing an idea, seeking counsel, and executing the writing and organization of the Note, but he was also open and responsive to constructive feedback and suggestions for new directions. It was as easy to parry ideas with Luke in the Note-writing process as it was in class and at office hours.

It is clear from Luke's transcript that my experience with him is hardly anomalous. He has achieved A-level grades in a wide range of courses, including in doctrinally heavy courses relating intimately to the work of federal courts, such as Federal Courts and Criminal Adjudication. You will also notice that Luke's grades were less strong during his first semester. This, too, is unsurprising to one who understands the arc of Luke's life. He was born and raised deep in rural Pennsylvania, in a community that does not typically send its best and brightest to Ivy League universities. (Luke himself transferred to Penn undergrad from Lafayette College.) Luke's 1L year was conducted remotely, and so many of the organic learning opportunities that come with proximity and social interaction—and that are less needed for those raised in "elite" spaces—were unavailable to Luke during that first semester. The trajectory of Luke's grades since that first semester has been resolutely upward.

Luke is exceptionally well-prepared for the work of a federal judicial clerk. Besides his well-demonstrated doctrinal acumen and writing ability, he has also worked as a research assistant and copy editor, and so understands better than most the art of the close read. He has experience drafting court orders and petitions, which was part of his work at Mazzoni Center Legal Services in Philadelphia. He has argued arraignments and hearings and gained exposure to the criminal justice process as an extern at Neighborhood Defender Service of Harlem. He also has exposure to corporate litigation as a summer associate at Dechert.

In some ways, though, what I firmly believe will endear you most to Luke as a candidate for a clerkship are less his manifest qualifications for the job—which would be enough—but his character. As I note above, Luke has an earnestness and a curiosity about him that make him easy to like and to interact with—I predict he will enliven your lunches in chambers. But it's more than that. When Luke talks about his law school experiences, the one that stands out the most isn't a moot court or an exam performance. It's last Thanksgiving, when he took time away from his family to talk on the phone with a client of his from Neighborhood Defender Service of Harlem. The client was in a shelter, suffering from mental illness, and going through a hard time. Luke counseled his client, as he has others in similar situations, and helped him get in touch with a social worker who could get him the care he needed that day.

This is the person Luke is, and he happens to be able to write a killer bench memo to boot. I am honored to recommend him.

Thank you for your kind consideration. Please do not hesitate to reach out if I can be of additional assistance.

Jamal Greene - jamal.greene@law.columbia.edu - 212-854-5865

Sincerely,

Jamal Greene
Dwight Professor of Law

Jamal Greene - jamal.greene@law.columbia.edu - 212-854-5865

LUKE YAMULLA
Columbia Law School J.D. '23
570-926-0013
LDY2103@columbia.edu

CLERKSHIP APPLICATION WRITING SAMPLE

This enclosed memorandum is a revised version of a memorandum I wrote during my externship at the Neighborhood Defender Service of Harlem (NDS). I was asked to listen to a 911 call and evaluate whether it would be admissible in our client's criminal trial. My supervisor moved to exclude the call based on this memorandum. Pre-trial motions, including my supervisor's motion to exclude the call, have yet to be decided due to a discovery violation on the part of the prosecution. I have permission to use this writing sample from my NDS supervisor, and it has been edited to assure confidentiality.

In the Matter of People v. Jones re: Alleged Robbery in Third Degree

From: Luke Yamulla (ldy2103@columbia.edu)

To: Gregory Gomez (ggomez@ndsny.org)

Date: April 7, 2023

Issue Presented

The people seek to introduce into evidence at trial a 911 call where the caller first claimed he witnessed the alleged theft of a tip jar from a NYC food truck at knifepoint, and then described the suspect to the 911 operator. Our client, Mr. Jones, was arrested by the police based on this 911 call and has been charged with the crime of robbery in the third degree, which is a felony charge. The people concede that the call is hearsay but argue that it falls under the New York present sense impression and excited utterance exceptions. The people also claim that admitting the call would not violate the Sixth Amendment of the U.S. Constitution under the principles articulated in *Crawford v. Washington,* 541 U.S. 36 (2004). The declarant will not appear for cross-examination at trial and the defense has not had the opportunity to cross-examine him prior to trial. Is the call admissible?

Short Answer

No, the call is inadmissible. New York hearsay rules require the description of the alleged theft to be excluded. The present sense impression exception does not apply to the caller's account of the alleged theft because the caller was not describing the theft as it was happening or immediately thereafter. Moreover, because the caller was not sufficiently impaired by a startling event, no portion of the call would fall under the excited utterance exception. Admittedly, the description of the suspect's appearance could arguably be a present sense impression because the caller described the suspect as he was following him. Nevertheless, the description is

inadmissible under *Crawford*. It is a testimonial out-of-court statement, and the defense will not have the opportunity to cross-examine the declarant. Therefore, no parts of the call are admissible.

Summary of Relevant Facts

Declarant Mr. Smith called 911 to report an alleged theft of a tip jar from a food truck at knifepoint. At the call's inception, Mr. Smith was put on hold for a minute and thirty-five seconds because he does not speak English, and the 911 operator needed to obtain an interpreter. The operator first asked why Mr. Smith was calling and he stated, "I saw a guy steal the tips from a food truck. He had a knife." The 911 operator then asked when Mr. Smith saw the alleged theft. He replied, "A few minutes ago. I am following him now. We are on 112th and Amsterdam." The food truck was on 116th and Amsterdam. After this, the operator asked questions about the suspect's clothing, race, height, and build. Mr. Smith answered these questions. This led the police to identify Mr. Jones as the suspect. The people seek to introduce the call at trial to show someone matching Mr. Jones's description displayed a knife and robbed the food truck. This call is essential to their case because the charge of robbery in the third degree requires the people to show that there was a forcible theft of property. N.Y. Penal Law § 160.05 (McKinney). The mention of the knife is how the people seek to prove Mr. Jones forcibly stole the tip jar. The people concede that they are introducing the call for the truth of the matter asserted and that the call is hearsay.

Analysis

I. New York Hearsay Law

a. Present Sense Impression

The present sense impression exception to New York's hearsay rule does not apply to Mr. Smith's description of the alleged theft because, by his own account, Mr. Smith had several minutes to reflect on the alleged theft. In New York, "the present sense impression exception permits a court to admit hearsay testimony of a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." *People v. Brown*, 80 N.Y.2d 729, 732 (1993). The Court of Appeals has held that "[a]lthough we recognize that there must be some room for a marginal time lag between the event and the declarant's description of that event, that recognition does not obviate the basic need for a communication that reflects a present sense impression rather than a recalled or recast description of events that were observed in the recent past." *People v. Vasquez*, 88 N.Y.2d 561, 575 (1996). "'[T]he time for reflection is not measured in minutes or seconds,'" but rather "'is measured by facts.'" *Id*. at 579 (quoting *People v. Marks*, 6 N.Y.2d 67, 72 (1959)).

At the start of the call, Mr. Smith stated that the alleged theft occurred "a few minutes ago." Mr. Smith had to wait for an interpreter and did not begin describing the incident until one minute and thirty-five seconds into the call. Mr. Smith also stated that he had followed the suspect to 112th Street. The food truck was on 116th Street. This means that they had walked four New York City blocks between the time Mr. Smith allegedly saw the theft and began describing the incident. In *People v. Merritt*, the First Department held that a 911 caller had sufficient time to think about a past occurrence when the caller "walked almost one full block before he thought about the incident and decided to return to the scene and call 911." *People v. Merritt*, 146

N.Y.S.3d 259, 260 (2021). By his own account, Mr. Smith waited several minutes to call 911 while he followed Mr. Jones and would have had time to think about the incident before he called. He had further time to reflect while the operator obtained an interpreter. The statements describing the alleged theft were not made "immediately" after Mr. Smith observed the event. *Brown*, 80 N.Y.2d 729, 732 (1993).

Some statements in the call may constitute present sense impressions. Mr. Smith claimed that he was actively following the suspect and was sharing his location in the present moment. Mr. Smith also described the suspect's clothing, race, height, and build while he was in pursuit. The people may argue that because the descriptions of the suspect's movements and appearance were contemporaneous, the call was a description of an ongoing event. While the court may agree that the descriptions of the suspect's movements and appearance are present sense impressions, admitting the entire call as a present sense impression would conflict with the rationale behind the exception. Out-of-court statements reflecting a present sense impression are admissible because "the contemporaneity of the event observed and the hearsay statement describing it leaves no time for reflection. Thus, the likelihood of deliberate misrepresentation or faulty recollection is eliminated." *Brown*, 80 N.Y.2d 729, 733 (1993). The time Mr. Smith had to reflect on the alleged theft eliminated the assurance of reliability that justifies admitting present sense impressions. Therefore, even if the court admits the descriptions of the suspect as present sense impressions, the description of the alleged theft cannot be admitted.

The people may respond to this by pointing to the New York Court of Appeal's holding in *People v. Brown* where the court found that a police officer's radio message stating "one man had been caught but 'the white guy [was still] on the roof…. police backup was needed to catch him'" was a present sense impression. *Id.* at 732. The people could argue that the statement that

"one man had been caught" was describing a past event, but its connection to ongoing events justified admitting the statement as a present sense impression. They could then ask the court to admit the description of the alleged theft in this case because of its connection to the ongoing event of Mr. Smith following the suspect. This is a misreading of *Brown*. The statement that "one man had been caught" was part of the police officer's description of an ongoing condition. The police officer was stating that he needed backup because despite capturing one suspect, they were unable to catch all the suspects. *Id*. Some, but not all, of the suspects being captured was the present condition the police officer was experiencing as he made his statements. Mr. Smith's description of the alleged theft, by contrast, was a description of an event that had "come to a final…end and the defendant had run from the crime scene." *Vasquez*, 88 N.Y.2d 561, 578 (1996). Such statements cannot be considered present sense impressions. *Id*. The present sense impression exception does not apply to the statements describing the alleged theft because Mr. Smith had excess time to reflect upon the incident. However, the description of the suspect may be a present sense impression and may be admissible if it complies with the Sixth Amendment protections described in *Crawford*. I will discuss this federal constitutional issue further below.

b. Excited Utterance

No part of the call is admissible as an excited utterance. The Court of Appeals has stated that "the excited utterance exception [applies] when [the statement was] made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication." *People v. Johnson*, 1 N.Y.3d 302, 306 (2003). In determining whether a statement is sufficiently influenced by excitement, courts look to the time that has passed since the startling event and the nature of the event causing the excitement. *Id*.

Like with present sense impressions, time is only one factor to be considered when determining whether a statement was an excited utterance and there are no hardline rules about how long after an event is too long. *Id.* In distinguishing present sense impressions from excited utterances, the Court of Appeals has noted that they are closely related but excited utterances focus on whether the declarant was exposed to "a startling or upsetting event that is sufficiently powerful to render the observer's normal reflective processes inoperative." *Vasquez*, 88 N.Y.2d 561, 574 (1996). The key components of excited utterances are "spontaneity and the declarant's excited mental state." *Id.* at 575.

In some exceptional circumstances, a declarant can maintain a sufficient level of excitement even after the passage of time. For example, in *People v. Ortiz*, the Second Department allowed a statement made by a witness to police officers to be admitted under the exception despite the declarant having had adequate time to try to make two phone calls, talk to 911, and wait for the police to arrive after witnessing a shooting. *People v. Ortiz*, 198 A.D.3d 924, 927 (2021). However, the court found the relevant excitement in *Ortiz* was not only from the shooting that was at the center of the case. *Id.* at 577. When the police arrived, the declarant was not only reeling from the shooting but also arguing with others in the apartment. *Id.* The EMTs were still treating victims, a dead body was still in the room, and the declarant was noted to be pacing, shaking, and yelling. *Id.* Merely being at the scene of something dramatic is insufficient to maintain the necessary level of excitement. The facts of a case must be extraordinary, like the facts in *Ortiz*, for a declarant to maintain a sufficient level of excitement over an extended period to be considered entitled to this exception.

For example, in *People v. Crombleholme*, the Fourth Department held that statements made to police and fire officials ten minutes after a car accident were not excited utterances even

though the declarant was trapped in a car just moments before making her statements. *People v. Crombleholme*, 8 A.D.3d 1068, 1070 (2004). The court found that the crash itself was the relevant exciting incident and the declarant had sufficient time to calm down in the ten minutes it took for the emergency responders to help others involved in the crash. *Id*. The Court of Appeals has even found that extreme injury and ongoing pain alone are not sufficient to establish an excited utterance. *Johnso*n, 1 N.Y.3d 302, 307 (2003). In *Johnson*, the Court of Appeals found that a stabbing victim who was still in intense pain from their stab wound had calmed down within an hour and thus, the excited utterance exception did not apply to the victim's statements. *Id*.

The causes of excitement in the caselaw are far more severe than the facts of the case at hand. The people will argue that the declarant was so shocked and disgusted by the alleged act of stealing a tip jar at knifepoint that these emotions were sufficient to "render [his] normal reflective processes inoperative." *Vasquez*, 88 N.Y.2d 561, 574 (1996). To support this, they may point to the fact that the declarant was still following the suspect at the time of the call and thus was still disgusted at the time of the statements. But this is not a case where the declarant saw someone get injured or was the victim of a crime. Comparing this case to the facts in *Johnson*, for the people's theory to be correct, the trial court would have to find that after several minutes and four blocks of walking behind the suspect, Mr. Smith was so offended by the alleged theft that his thinking was more impaired than the *Johnson* declarant's thinking. That declarant was stabbed and still had an open stab wound. *Johnso*n, 1 N.Y.3d 302, 307 (2003). Similarly, the trial court judge would also have to find that Mr. Smith was more impaired by excitement than the declarant in *Crombleholme* who spoke to emergency responders after a car accident that left him injured and trapped in a totaled car. *Crombleholme*, 8 A.D.3d 1068, 1070 (2004). That car crash

was so severe that somebody died. *Id*. The central question is not whether Mr. Smith was emotional. The question is whether Mr. Smith was so influenced by recent events that he could not possibly reflect on them. If the declarants in *Johnson* and *Cormbleholme* were not sufficiently excited given their cases' more extreme fact patterns, Mr. Smith could not possibly have maintained a sufficient level of excitement in this case. In the tapes, Mr. Smith's tone of voice even sounds as though he has a calm demeanor. Mr. Smith was not sufficiently influenced by excitement to render him incapable of reflection. The excited utterance exception does not apply to any part of the call and none of the people's proposed hearsay exceptions apply to the portion of the call describing the theft.

II. Federal Law

The issue remains, however, as to whether Mr. Smith's description of the suspect as a present sense impression is admissible under the Confrontation Clause of the Sixth Amendment. Because the defense will not have the opportunity to cross-examine Mr. Smith, admitting the description would violate Mr. Jones's rights under the Confrontation Clause. Under the United States Supreme Court's decision in *Crawford v. Washington*, testimonial out-of-court statements that fall under a state or federal hearsay exception are still generally inadmissible under the Confrontation Clause of the Sixth Amendment if a criminal defendant does not have an opportunity to cross-examine the declarant. *Crawford*, 541 U.S. 36 (2004).

Once it is established that a criminal defendant will not have the opportunity to cross-examine a declarant, the key question under *Crawford* is whether the declarant's statements are "testimonial." *Id*. In *Davis v. Washington*, the U.S. Supreme Court held that responses to a police officer's or 911 operator's inquiries are not testimonial if the "primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis v. Washington*,

547 U.S. 813, 822 (2006). *Davis* involved a 911 call and the Court stated that 911 calls are "ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." *Id.* at 827. The Court did not, however, rule out the possibility that some 911 calls can be testimonial stating, "[a]lthough one might call 911 to provide a narrative report of a crime absent any imminent danger, [the *Davis* declarant's] call was plainly a call for help against bona fide physical threat." *Id*. The Court also stated that a 911 call can start "as [an admissible non-testimonial] interrogation to determine the need for emergency assistance [but then can], as the Indiana Supreme Court put it, 'evolve into testimonial statements,' once that purpose has been achieved." *Id*. at 828 (quoting *Hammon v. State*, 829 N.E.2d 444, 457 (Ind. 2005)). If this is the case, the non-testimonial parts of the call can be admitted and the trial court "should redact or exclude the portions of any statement that have become testimonial." *Id*. at 829. It is important to note that *Crawford* is a constitutional rule that only determines whether out-of-court statements that fall under a state or federal hearsay exception are admissible under the Confrontation Clause. *Crawford*, 541 U.S. 36, 60 (2004). Even if a statement is non-testimonial, it still must comply with the relevant state or federal hearsay rules. *Id.* If half of a call is admissible under the relevant hearsay rules but not *Crawford* and the other half is admissible under *Crawford* but not the relevant hearsay rules, the entire call is inadmissible.

The question of whether the purpose of an inquiry is to aid in an emergency or further a prosecution is a "fact-based question that must necessarily be answered on a case-by-case basis." *People v. Nieves-Andino*, 9 N.Y.3d 12, 15 (2007). The facts at hand show that the primary reason for the 911 operator's inquiry into the suspect's appearance was to identify him for future prosecution. The people have a strong argument that Mr. Smith's description of the alleged theft

is non-testimonial. At the beginning of the call, the 911 operator asked Mr. Smith why he was calling and at that point, she could have reasonably assumed that there was a potential emergency that needed to be identified given the nature of 911 calls. However, as previously discussed, the description of the alleged theft does not fall under a hearsay exception. Therefore, it is inadmissible regardless of *Crawford*. In this case, *Crawford* is only determinative of whether the description of the suspect is admissible because that is the only part of the call that arguably falls under a New York hearsay exception.

After Mr. Smith described the alleged theft, he stated that the event happened a few minutes prior and that he had been following the suspect for several blocks. At this point, the operator knew there was no emergency, and her inquiry's "purpose of determine[ing] the need for emergency assistance… ha[d] been achieved." *Davis*, 547 U.S. 813, 828 (2006). It was clear that Mr. Smith was not the victim of a crime. He did not need medical attention. He was not being threatened by anyone and he did not indicate that anyone was in danger. The operator even asked if Mr. Smith was still following the suspect and how far he had followed him. Once this was clear, the operator should have realized that Mr. Smith was calling because he was angry about something he saw and wanted to help the police identify someone for prosecution. The primary purpose of these questions was to identify a suspect because it could be "potentially relevant to later criminal prosecution." *Davis*, 547 U.S. 813, 822 (2006). The responses should be excluded under *Davis* and *Crawford*. *Id*.

The people may point to the fact that Mr. Smith alleges he saw a knife and argue that the operator could have believed that the purpose of the 911 call was to aid the police in apprehending someone on the loose with a dangerous weapon. But Mr. Smith was not afraid of the suspect. He was actively following him. If he was worried that the suspect was dangerous,

following him would have been unsafe. Further, the operator never asked if Mr. Smith was in danger or advised him to stop following the suspect. She just asked him to describe the suspect's appearance. If the operator believed the suspect was dangerous, she would have said something to ensure Mr. Smith was safe or indicated concern for Mr. Smith's safety. The mere mention of someone on the loose with a weapon is not sufficient to establish that the purpose of an inquiry was to aid in an emergency. *See People v. Clay*, 926 N.Y.S.2d 598, 606 (2011) (finding that an officer's purpose for asking questions about the identity of a shooter was not to aid in an emergency despite that shooter being on the loose with a gun). Mr. Smith's descriptions of the suspect are testimonial hearsay. Because the defense will not have the opportunity to cross-examine Mr. Smith about those statements, they must be excluded under *Crawford*.

Conclusion

The entire call is inadmissible. Mr. Smith's description of the alleged theft does not fall under a hearsay exception and therefore, it is inadmissible regardless of *Crawford*. The description of the suspect may be a present sense impression, but it is inadmissible under *Crawford*. The description is a testimonial out-of-court statement, and the defense will not have an opportunity to cross-examine Mr. Smith. Admitting the statement would violate Mr. Jones's rights under the Confrontation Clause of the Sixth Amendment.

Applicant Details

First Name	**Hamee**
Last Name	**Yong**
Citizenship Status	**U. S. Citizen**
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Address	**Address** **Street** **9820 Exposition Blvd #304** **City** **Los Angeles** **State/Territory** **California** **Zip** **90034** **Country** **United States**
Contact Phone Number	**3127712832**

Applicant Education

BA/BS From	**University of Chicago**
Date of BA/BS	**June 2017**
JD/LLB From	**University of Southern California Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90513&yr=2009**
Date of JD/LLB	**May 10, 2024**
Class Rank	**15%**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Hale Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Craig, Robin
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Armour, Jody
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Garry, Hannah
hgarry@law.usc.edu
213-740-9154

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Hamee Yong

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June 12, 2023

The Honorable Juan R. Sánchez
United States District Court for the Eastern District of Pennsylvania
14613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106
Courtroom 14-B

Dear Judge Sánchez,

I am writing to apply for a 2024-2025 term clerkship in your chambers, or any subsequent term thereafter. I am a rising third-year law student at the University of Southern California Gould School of Law.

I entered law school to pursue indigent defense. By the age of sixteen, I had lived in three countries—South Korea, Singapore, and the United States— and had changed schools ten times. Having lived through multiple contexts, as an insider and outsider, I naturally became sensitive to how differences of color, social values, and country of origin can be manifested in systematic injustices that are born out of the process of othering. I spent my undergraduate career supporting education and employment opportunities for North Korean defectors in Hyde Park, Chicago, which drew me to refugee law. In law school, I chose to spend two summers in prosecutorial reform and indigent criminal defense and have worked with homeless, evicted, and refugee clients. As an aspiring public defender who hopes to merge her significant interests in criminal justice and immigration reform, I am keen on gaining unique insights into the role of advocacy in the judicial decision-making process in your chambers.

Before law school, I worked for four years as an investment banker and private equity investment associate in New York, conducting financial and operational due diligence on mid-market to multi-billion dollar enterprises. I believe such transactional experience would be an asset in your chambers when it comes to cases relating to securities and market transactions.

Enclosed please find a copy of my resume, my most recent transcript, and a writing sample. USC will submit letters of recommendation from Professor Hannah Garry, Professor Jody Armour, and Professor Robin Craig under separate cover. I would welcome the opportunity to interview with you. Thank you very much for your consideration.

Respectfully,

Hamee Yong

Enclosures

Hamee Yong

9820 Exposition Blvd., Apt. 304, Los Angeles, CA 90034 | hamee.yong.2024@lawmail.usc.edu | 312-771-2832

EDUCATION

University of Southern California Gould School of Law — **Los Angeles, CA**
Juris Doctor Candidate — *May 2024*
GPA: 3.79 (Class Rank forthcoming)
Honors: Hale Moot Court Honors Program; 2022 & 2023 Public Interest Summer Grant Recipient; 2023 FASPE (Fellowships at Auschwitz for the Study of Professional Ethics) Fellow; 2023-2024 American Association of Women Selected Professions Fellowship Recipient ($20,000)
Activities: Public Interest Law Foundation (Pro Bono Chair); International Refugee Assistance Project (President)

The University of Chicago — **Chicago, IL**
Bachelor of Arts in Economics with Honors; Minor in Human Rights — *Jun 2017*
GPA: 3.64
Honors: Dean's List; Odyssey Scholar; Mirae Asset Global Investors Scholarship Recipient ($80,000)

LEGAL EXPERIENCE

Brooklyn Defender Services, Criminal Defense Practice — **New York, NY**
Summer Clerk — *Jun 2023 – Aug 2023*
Will draft motions, legal briefs, and appear on record under attorney supervision.

USC Gould School of Law — **Los Angeles, CA**
Research Assistant to Professor Hannah Garry — *Aug 2022 – Present*
Research existing international mechanisms for refugee protection and victim reparations at the ICC & tribunals.

Student Attorney, International Human Rights Clinic — *Aug 2022 – May 2023*
Represented an Afghan female in an affirmative asylum case. Travelled to Malawi to interview women incarcerated for their acts of self-defense against gender-based violence.

Fair and Just Prosecution — **New York, NY**
Summer Fellow at Westchester County District Attorney's Office: Conviction Review Unit — *May 2022 – Aug 2022*
Drafted a legal & policy recommendation memo on threats to shoot up places. Analyzed case files and transcripts on a case involving a plausible claim of innocence based on conflicting eyewitness testimonies.

PROFESSIONAL EXPERIENCE

Morgan Stanley Alternative Investment Partners — **New York, NY**
Private Equity Investment Associate — *Mar 2019 – Apr 2021*
Executed buy-out opportunities by conducting financial & operational due-diligence in a 2–3-person deal team.

Mizuho Securities — **New York, NY**
Investment Banking Analyst: Financial Sponsors Group — *Jul 2017 – Feb 2019*
Advised private equity funds on acquisition targets and exit options through IPO, divestitures, and M&A.

PRO BONO ACTIVITIES

Parole Justice Works, *Legal Volunteer* — *Jan 2022 – Jan 2023*
Community Legal Aid SoCal, *Intake Volunteer* — *Jan 2022 – May 2022*
International Refugee Assistant Project, *Naturalization Clinic Volunteer* — *April 2022 – May 2022*
Skid Row & Venice Beach Homeless Citation Clinic, *Intake Volunteer* — *Sep 2021 – May 2022*

SKILLS & INTERESTS

Language: Fluent in Korean & Conversational in Chinese.
Interests: Enjoys skiing, ice-skating, wheel pottery, and exploring different metro systems around the world.

On-line Academic Student Information System

OASIS Unofficial Transcript

ID#: 3427027654

askUSC Knowledge Base Start Here

Last Name	First Name
Yong	Hamee

Unofficial Transcript

Current Degree Objective

	Degree Name	Degree Title
MAJOR	Juris Doctor	Law

Cumulative GPA through 20231

	Uatt	Uern	Uavl	Gpts	GPAU	GPA
UGrad	0.0	0.0	0.0	0.00	0.0	0.00
Grad	0.0	0.0	0.0	0.00	0.0	0.00
Law	60.0	60.0	60.0	204.90	54.0	3.79
Other	0.0	0.0	0.0	0.00	0.0	0.00

Fall Term 2021

Course	Units Earned	Grade	Course Description
LAW-515	3.0	4.0	Legal Research, Writing, and Advocacy I
LAW-503	4.0	3.9	Contracts
LAW-509	4.0	3.5	Torts I
LAW-502	4.0	4.1	Procedure I

Spring Term 2022

Course	Units Earned	Grade	Course Description
LAW-531	3.0	3.4	Ethical Issues for Nonprofit, Government and Criminal Lawyer
LAW-516	2.0	4.0	Legal Research, Writing, and Advocacy II
LAW-504	3.0	3.7	Criminal Law
LAW-508	3.0	3.8	Constitutional Law: Structure
LAW-507	4.0	3.5	Property

Fall Term 2022

Course	Units Earned	Grade	Course Description
LAW-667	2.0	3.6	Hale Moot Court Brief
LAW-787	2.0	4.0	Race, Social Media and the Law
LAW-743	2.0	4.0	Federal Criminal Law
LAW-608	4.0	3.6	Evidence
LAW-849	5.0	CR	International Human Rights Clinic I

Spring Term 2023

Course	Units Earned	Grade	Course Description
LAW-817	3.0	4.1	International Arbitration
LAW-721	3.0	3.8	Crime, Punishment and Justice
LAW-602	3.0	3.8	Criminal Procedure
LAW-850	5.0	3.9	International Human Rights Clinic II
LAW-668	1.0	CR	Hale Moot Court Oral Advocacy

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is my great pleasure to recommend Hamee Yong for a clerkship in your chambers, to begin late summer or early fall 2024. Ms. Yong is currently finishing her second year here at the University of Southern California (USC) Gould School of Law. Last year, she was a student in my Fall 2021 Civil Procedure course, where she earned one of the highest grades in the class. Ms. Yong has demonstrated that she has the skills and the drive to be an excellent judicial clerk.

Ms. Yong is an excellent legal researcher and writer. She earned solid A grades (4.0) in both semesters of her first-year Legal Research and Writing course, as well as a 4.0 in the seminar she completed last semester (Fall 2022) on "Race, Social Media, and the Law." In addition, last year I had my Civil Procedure students write a simple federal court complaint, and Ms. Yong did an outstanding job, earning a grade of 4.3 on the assignment. The heart of the assignment was to write a complaint that would satisfy the most scrupulous judge apply the standards of Twombly and Iqbal. I frame the assignment this way to force students to work with facts rather than legal argument—broadening their skills from what they learn in Legal Writing. Ms. Yong did a marvelous job of presenting the facts I provided in the assignment to her client's advantage in a lively and straightforward way, while also remaining safely within ethical and legal boundaries.

One thing worth noting is that at Gould, rising 2Ls have to choose between being on a law review or participating in our Hale Moot Court Honors Program; they cannot do both. This was a real choice for Ms. Yong, and she chose to participate in moot court. Nevertheless, her interest in writing remains strong, and she plans to complete a Directed Research project before she graduates to write a law review comment comparing the penal systems in the United States and Korea. She has also been working as Professor Hannah Garry's research assistant.

Ms. Yong is already dedicated to advancing the public interest through the rule of law. Indeed, at Gould, she devotes much of her energy to public interest projects. For instance, she is President of Gould's chapter of the International Refugee Assistance Project (IRAP). IRAP is a legal aid/advocacy organization focused on refugee rights, and there are about 29 law schools that maintain a school chapter of IRAP. Ms. Yong coordinates pro bono projects/clinics, such as Afghan Special Immigration Visa (SIV) case support, country conditions research projects, and Title 42 screening clinics. She also collaborated with the International Law and Relations Organization (ILRO) and Gould's International Human Rights Clinic to host several events during the 2022-2023 academic year, inviting a Hong Kong political asylee and activist (Sunny Cheung) to talk about Hong Kong democratic movements and Professor Iryna Zaveruhka and Ambassador Rapp to discuss the Russian war on Ukraine and accountability measures under international law. In addition, Ms. Yong participates and our International Human Right Clinic and runs the Public Interest Law Foundation's pro bono program here at Gould and has accumulated 55 pro bono hours in addition to her clinical work.

In addition to her work in our clinic, Ms. Yong is developing professional experience through other avenues, as well. After her first year of law school, she worked as a Summer Fellow in the Westchester County District Attorney's Officer as part of the Conviction Review Unit. This summer (2023) she will be working with the Brooklyn Defenders Service doing criminal defense work in New York City. Notably, before coming to law school, she worked in investment banking.

Hamee Yong thus offers you a combination of legal research and writing skills, a commitment to public service, and practical experience in both civil and criminal law. She has also demonstrated an excellent ability to manage several complex projects at once while remaining cheerful and confident.

In short, I recommend Hamee Yong without reservation for a judicial clerkship in your chambers. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Robin Kundis Craig
Robert C. Packard Trustee Chair in Law
USC Gould School of Law
699 Exposition Blvd.
Los Angeles, CA 90089
Phone: 213-821-8153
E-Mail: rcraig@law.usc.edu

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

It is with great pleasure and without reservation that I write this letter of recommendation for Ms. Hamee Yong. I know Ms. Yong as a student in one of my large 1L class, Criminal Law, where she received an A-.

Ms. Hamee Yong was president of the International Refugee Assistance Project (IRAP) at USC Gould School of Law during her first year. IRAP is a legal aid/advocacy organization focused on refugee rights. During her presidency she coordinated pro bono projects/clinics and collaborated with International Law and Relations Organization (ILRO) and the International Human Rights Clinic to host several events over a year. This student group is in association with about 29 law schools that maintain a school chapter of IRAP.

Ms. Hamee was also a member of the International Human Rights Clinic where she was tasked with two workstream, Affirmative asylum for Afghan female and Trial Watch /Waging Justice for Women. She also was a research assistant for the director of the International Human Rights Clinic and was tasked to with two other research assistants to provide a summary of existing mechanisms to strengthen refugee protection under international law. She was a Hale Moot Court participant.

Hamee's strengths include intelligence, seriousness of purpose, diligence, sound character and enthusiasm. In the classroom, she welcomes challenges, inviting and thriving on intellectually challenging assignments and interactions. Outside the classroom and library, she is personable and highly-regarded by her peers. She has strong interpersonal skills and can carry on intense discussions about emotionally-charged topics with diplomacy, tact and wit. Put differently, she can negotiate the ambiguous and sometimes treacherous social terrain that characterizes law school student bodies in an exemplary way.

Hamee is also committed to engaging in serious reflection on legal issues rather than merely credentializing or padding her resume. Her interest in the study of law as an intellectual adventure has kept her motivated to refine and hone her legal writing. In a word, I do not hesitate to give Ms. Yong the highest recommendation. I am customarily something of a curmudgeon, stingy to a fault with praise. Nevertheless, when I come across someone who has earned and deserves it, I give credit where it is due. Hamee Yong is a student I can recommend with enthusiasm and without qualification. I would be glad to expand on these remarks over the phone or by e-mail.

Sincerely,

Jody David Armour
Roy P. Crocker Professor of Law

JDA/mcm

Jody Armour - jarmour@law.usc.edu - (213) 740-2559

June 11, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to give my enthusiastic support for Ms. Hamee Yong's application for a clerkship in your Chambers. I have known Hamee since April 2022 when I selected her through a competitive interview and application process for enrollment in the International Human Rights Clinic at the University of Southern California ("USC") Gould School of Law, which I direct. She was one of nine students participating in the Clinic in the 2022-2023 academic year (chosen from around 30 that applied). She was also my research assistant ("RA") for the 2022-2023 academic year on international law articles related to enforcement of international refugee law, compensation for atrocity crimes (war crimes, crimes against humanity and genocide), and transitional justice. Together with two other RAs, she met with me on a weekly basis to go over the research questions that I asked her to look into as well as the sources that she found. Finally, I am the faculty supervisor for the International Refugee Assistance Project ("IRAP"), a law student group which she led in the 2022-2023 academic year.

In the Clinic, Hamee worked on three different cases and projects, dedicating 15-20 hours per week on average to the work. One involved representing a female client for affirmative asylum in the U.S. who is an Afghan fleeing gender based and political persecution, which involved in-depth interviewing of the client; drafting of the client's declaration on her persecution claims; drafting of a brief establishing the client's claims under international refugee law and US immigration law; gathering evidence and other documentation to corroborate the client's declaration; and filling out immigration forms. In addition, Hamee and two other Clinic students drafted a memo for an advocacy campaign to classify discrimination against women and girls in Afghanistan as gender apartheid, an international crime, and call for accountability before various UN human rights mechanisms as well as the International Criminal Court. Finally, Hamee worked with three other students on a fair trial rights project in Malawi, surveying women in prisons who have charges against them due to gender-based violence in order to gather data for a report identifying patterns of violations of fair trial rights under international human rights law and advocating for legal reform. This work involved developing a questionnaire for in-depth interviewing; drafting an interview protocol; analysis of court documents for specific cases; and travel to Malawi in February 2023 for conducting the interviews.

Having worked closely with Hamee, I am absolutely certain that she would be an ideal law clerk for the following reasons. First, as demonstrated by her work in the Clinic and RA work, Hamee is bright and a quick learner. This became evident in our Clinic seminar class where we covered the substantive law and procedure for engaging in the Clinic's cases; in our weekly supervision meetings with her, as we reviewed her work product; and in our RA meetings as we analyzed law review articles and books on a given topic. She was always well-prepared, and her questions and comments were often quite insightful and creative on topics of law that were completely new to her. She is quite curious, and her questions evidenced a deep engagement with the material.

Second, Hamee is a natural at collaboration and teamwork. Typically, she worked with one to four other students in her Clinic work and international legal research. The teams reviewed each other's research and drafting, maintained the case files, and led seminar classes together on their casework. I noticed that Hamee leads by example through her strong organizational skills, attention to detail and dedication to making sure that the group work is completed as thoroughly as possible. She is absolutely dependable and reliable, which instills a lot of trust in her and her work.

Third, when finding herself in emotional and intellectually intense classroom discussions, I observed that Hamee remains quite grounded and non-reactionary. She does not shy away from such exchanges or avoid them; rather, she comes prepared with thoughtful, well-backed questions and views, which she offers up after hearing from others first. I have observed this particularly when co-organizing two speaker events in the law school with her in her capacity as president of the student-led IRAP organization. The first event involved hosting a democracy defender from Hong Kong now in exile in the United States, which the Chinese government demanded that USC cancel due to the high enrollment of Chinese students at the university. The second entailed hosting a professor from Ukraine who gave a historical and legal perspective on the ongoing war in Ukraine following Russia's invasion in February 2022, whose family and friends continue to suffer and remain in serious danger for their lives. Both events involved highly emotional presentations and Q/A sessions following. Further, in response to the presentation by the Hong Kong democracy activist, confrontational statements were made by one individual in the audience whom we suspected was doing so at the bidding of the Chinese consulate in Los Angeles to challenge the credibility of democracy protests in Hong Kong. While I played the leading role in moderating these discussions as professor, Hamee did an excellent job helping me to prepare for both events and facilitate productive discussions where all views were allowed and expressed so long as they were done so in a respectful and professional manner, seeking to understand the other and learn through the process.

Finally, on a more personal level, it is a pleasure to interact with Hamee. She is absolutely dedicated to her studies and work, and completes work product in a professional manner. She is hard working, and turns in assignments on time. She is able to multi-task with ease. I have always found that Hamee responds very well to constructive feedback and learns quickly when given direction. In addition, she is a great communicator. Her strong communications skills were evident when she led her fellow students in discussion of her casework during the seminar. She is a natural public speaker and, at the same time, is an active listener who engages well with others in the classroom. More generally, she possesses a level of maturity beyond her years and is pleasant conversationalist with a nice sense of humor. As a result of all of the above, I anticipate that she will earn an A or A+ in

Hannah Garry - hgarry@law.usc.edu - 213-740-9154

the Clinic this spring semester, and currently rank her at the top of the Clinic class. Because of her strong performance as my RA and in Clinic, I have invited her to continue on as my RA over this summer, and she will be joining the Clinic again as an Advanced Clinical student next academic year, assisting me with supervising new Clinic students in their work.

For these reasons, I highly recommend Hamee for a clerkship in your Chambers. If you need any further information, please do not hesitate to write or call.

Best Regards,

Hannah Garry

Hannah Garry - hgarry@law.usc.edu - 213-740-9154

Hamee Yong

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WRITING SAMPLE

The attached writing sample is an excerpt from a brief I submitted for the Hale Moot Court Honors Program at the USC Gould School of Law. The case concerned a legal question of whether the Sixth Amendment right to counsel attaches at a preindictment plea stage.

A brief **statement of facts** is provided below:

The defendant-respondent James Robertson received a target letter informing that he was a subject of a grand jury investigation for money laundering. The Assistant United States Attorney (AUSA) offered an oral preindictment offer that would allow Robertson to plead guilty to one count of tax evasion. The government provided no preindictment discovery. In light of Robertson's representation of innocence, his defense counsel advised him not to accept the preindictment plea, and Robertson rejected the offer. Soon thereafter, a federal grand jury indicted Robertson for conspiracy to launder narcotics proceeds, money laundering, and tax evasion. Strong evidence of his guilt emerged against Robertson. Robertson indicated to the government his interest in receiving another plea offer. The government sent a written plea agreement that required him to plea to all charges as stated in the federal indictment. Robertson entered his guilty plea. Subsequently, Robertson hired a new attorney and filed a motion to withdraw his guilty plea, arguing that his first counsel rendered ineffective assistance of counsel when she advised him not to accept the preindictment plea offer.

The **questions presented** for the competition were:

I. Did the district court properly deny a defendant's motion to withdraw his guilty plea pursuant to a bright-line attachment rule that the Sixth Amendment right to counsel only attaches after adversarial judicial proceedings have begun, given that the bright-line rule follows directly from the plain text of the Sixth Amendment and various policy considerations support it over a functional standard?

II. Even if the defendant's right to counsel had attached at a preindictment plea stage, did the district court properly deny his ineffective assistance of counsel claim because his first defense counsel rendered effective assistance and even if her performance was deficient, the defendant was not prejudiced by her advice?

I represented the plaintiff-petitioner, the United States of America. For this sample, I chose the section of brief addressing only the **first question presented**. This sample has not been edited by others and is entirely my own work.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED DEFENDANT ROBERTSON'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE HIS RIGHT TO COUNSEL DID NOT ATTACH DURING HIS PREINDICTMENT PLEA NEGOTIATION AS A MATTER OF LAW.

The Sixth Amendment guarantees the right of the "accused" to have the assistance of counsel for his defense in all "criminal prosecutions." U.S. Const. amend. VI. The purpose of the Sixth Amendment right to counsel is rooted in the need to protect the accused's right at trial because an average defendant does not have the necessary legal skill to defend himself. Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938)(extending the Sixth Amendment right to counsel to non-capital cases in federal courts); see also United States v. Gouveia, 467 U.S. 180, 190 (1984)(holding that the Sixth Amendment right to counsel does not attach at the time of arrest because it "protect[s] the accused during trial-type confrontations with the prosecutor").

Two distinct inquiries govern the Sixth Amendment right to counsel jurisprudence. Rothgery v. Gillespie Cnty., 554 U.S. 191, 211 (2008). The Sixth Amendment right to counsel attaches only when formal judicial proceedings have begun against an accused. Id. Even after attachment occurs, an accused may assert a Sixth Amendment right to counsel only during "critical stages" of postattachment proceedings. Id. at 212. If no

formal judicial proceedings have begun against an accused, the critical stage inquiry then becomes irrelevant as a matter of law because no attachment occurred. Id.

Following the bright-line attachment rule, the Supreme Court has repeatedly declined to extend the Sixth Amendment right to counsel to preindictment proceedings, even where the same proceedings are critical stages when they occur postindictment. Compare United States v. Wade, 388 U.S. 218, 236-37 (1967)(Sixth Amendment right to counsel in postindictment lineups), with Kirby v. Illinois, 406 U.S. 682, 690 (1972)(no Sixth Amendment right to counsel in preindictment lineups); compare Massiah v. United States, 377 U.S. 201, 205-06 (1964) (Sixth Amendment right to counsel in postindictment interrogations), with Moran v. Burbine, 475 U.S. 412, 431-32 (1986) (no Sixth Amendment right to counsel in preindictment interrogations).

No other courts have extended the Sixth Amendment right to counsel prior to the initiation of formal charges or judicial proceedings. See, e.g., Turner v. United States, 885 F.3d 949, 953-54 (6th Cir. 2018) (declining to extend the Sixth Amendment right to counsel to preindictment plea negotiations).

Defendants may withdraw a guilty plea after the court accepts it but prior to sentencing if they can show a fair and

just reason for requesting the withdrawal. Fed. R. Crim. P. 11(d)(2)(B).

Here, Robertson may not withdraw his guilty plea as a matter of law. His Sixth Amendment right to counsel did not attach at the time of his preindictment plea negotiation because no formal judicial proceedings or prosecution had commenced against him. The bright-line attachment rule should govern preindictment plea negotiations and the inquiry into whether a preindictment plea negotiation constitutes a critical stage is misplaced. Therefore, the district court correctly denied Robertson's motion to withdraw his guilty plea as a matter of law using the well-established bright-line attachment rule.

A. Standard of Review

A district court's denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. United States v. Cross, 962 F.3d 892, 896 (7th Cir. 2020). The district court does not abuse its discretion unless a defendant 'can show a fair and just reason' for withdrawing his guilty plea. Id.; Fed. R. Crim. P. 11(d)(2)(B). Whether the Sixth Amendment right to counsel attaches to preindictment plea negotiations is a question of law that is reviewed de novo. United States v. Moody, 206 F.3d 609, 613 (6th Cir. 2000) (declining to extend the Sixth Amendment right to counsel to preindictment pleas according to the bright-line attachment rule).

B. The Bright-Line Attachment Rule Follows Directly from the Plain Text of the Sixth Amendment and Upholds the Need for Ex Ante Clarity and Judicial Economy.

The phrase "criminal prosecutions" is unique to the Sixth Amendment and has been interpreted to limit Sixth Amendment counsel guarantee to critical stages at or after adversary judicial proceedings have been initiated. Kirby, 406 U.S. at 690 (declining to extend the bright-line attachment rule to preindictment interrogations).

1. The plain text of the Sixth Amendment commands a bright-line attachment rule.

The plain text of the Sixth Amendment requires that only the "accused" have the right to counsel in "criminal prosecutions." Gouveia, 467 U.S. at 188. The "accused" in criminal prosecutions have been interpreted as individuals "charged with crime" from the very onset of the Sixth Amendment right to counsel jurisprudence. See Powell v. Alabama, 287 U.S. 45, 69 (1932) (explaining that one "charged with crime" requires assistance of counsel); see also Zerbst, 304 U.S. at 467 (holding that an "accused" is "one charged with crime").

The term "criminal prosecutions" limits the Sixth Amendment right to counsel to the initiation of judicial criminal proceedings, which is "far from a mere formalism." Kirby, 406 U.S. at 689-90. Kirby established a bright-line attachment rule, holding that the Sixth Amendment right to counsel attaches

only at or after the initiation of adversary judicial criminal proceedings, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. Id. at 689. An individual turns into an accused only when the government has committed to prosecute because the commencement of criminal prosecutions marks alone the points at which "the explicit guarantees of the Sixth Amendment are applicable." Id. at 690. Thus, in Kirby, a defendant's Sixth Amendment right to counsel did not attach during his preindictment lineup because he was neither formally charged, indicted, nor arraigned. Id.

The distinction between "criminal prosecutions" under the Sixth Amendment and "criminal case[s]" under the Fifth Amendment has been interpreted to narrow the Sixth Amendment right to counsel to attach only when "prosecution" or "formal judicial proceedings" have been commenced against the accused. Rothgery, 554 U.S. at 222 (Thomas, J., dissenting) (noting that a criminal case under the Fifth Amendment is much broader than a criminal prosecution under the Sixth Amendment). While the Fifth Amendment right to counsel may attach to important preattachment stages of defense, such as police interrogations and identifications, the Sixth Amendment right to counsel does not extend to these proceedings. Compare Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) (Fifth Amendment right to counsel at preindictment custodial interrogations), with Kirby, 406 U.S. at

690 (no Sixth Amendment right to counsel at preindictment interrogations).

Because the attachment question follows directly from the plain text of the Sixth Amendment, it has never been governed by a functionalist inquiry of whether counsel would be valuable at particular stages of the criminal process. See Burbine, 475 U.S. at 431-32. Particularly, the functionalist inquiry has no place for a constitutional guarantee because it cannot turn on a "wholly unworkable" principle, such as the moment of a prosecutor's first involvement, which would "bog the courts down." Rothgery, 554 U.S. at 206. In Rothgery, a defendant's right to counsel did attach at his first appearance before a judicial officer because a formal accusation filed with the court marked the commencement of criminal prosecution, regardless of whether a prosecutor had known about his appearance. Id. at 207, 213.

Thus, the plain text of the Sixth Amendment necessitates a bright-line attachment rule, which evolved from a careful adherence to the words "accused" and "criminal prosecutions." The bright-line rule was drawn exactly where the text of the Sixth Amendment agreed: at or after prosecution, or adversary judicial proceedings have commenced against the accused.

2. Plea processes at a preindictment stage are particularly "amorphous," which necessitates a bright-line attachment rule.

Courts have recognized the need for a bright-line attachment rule that has a "historically and rationally applicable" basis that can provide ex ante clarity to both states and defendants. See Kirby, 406 U.S. at 690; see also United States v. Hayes, 231 F.3d 663, 675 (9th Cir. 2000) (recognizing a need for a "clean and clear rule that is easy enough to follow"). In Kirby, the Court foreclosed any possibility that the Sixth Amendment right to counsel may attach during preindictment proceedings, explaining that the Sixth Amendment right is preserved only for the "accused," or one charged with crime. 406 U.S. at 690-91. Without the state's commitment to prosecute, routine police investigation techniques, such as lineups, do not turn a suspect into an accused who is "faced with the prosecutorial forces of organized society." Id. at 689.

In the context of plea bargains, the Court has noted the highly non-linear and "amorphous" process that plea bargains entail, with "no clear standards or timelines" and lacking "judicial supervision of the discussions between prosecution and defense." Missouri v. Frye, 566 U.S. 134, 143-145 (2012) (explaining the difficulty of defining the duties of defense counsels in pleas); see also Premo v. Moore, 562 U.S. 115, 126

(2011) ("art of [plea] negotiation is at least as nuanced as the art of trial advocacy," removed from judicial supervision). In Frye and Lafler v. Cooper, 566 U.S. 156, 165-66 (2012), the Court recognized postindictment plea negotiations as critical stages of prosecution but did not suggest the Sixth Amendment right to counsel could extend to preindictment plea negotiations. 566 U.S. at 141.

Moving the bright-line rule to encompass any preindictment events, such as interrogations, lineups, or plea offers, jeopardizes the proper investigatory function of the state and constrains judicial economy. See Escobedo v. Illinois, 378 U.S. 478, 494 (1964)(Stewart, J., dissenting). Originally decided as a Sixth Amendment case involving preindictment interrogations, Escobedo was subsequently reframed as a Fifth Amendment privilege against self-incrimination in custodial interrogations, akin to Miranda rights. Kirby, 406 U.S. at 689 (citing Johnson v. New Jersey, 384 U.S. 719, 729 (1966)). If the Sixth Amendment right to counsel were to attach to preindictment proceedings, routine police investigations and interrogations will turn into judicial trials, impeding the legitimate and proper function of the government by imposing an unnecessary and impractical burden on the government to supply public defenders at any suspect's request. See Escobedo, 378 U.S. at 496 (White, J., dissenting).

Hence, the Court should be wary of the direct and collateral consequences of attaching the Sixth Amendment right to counsel to preindictment pleas, which would diminish the ex ante clarity of rights afforded by the bright-line rule and increase the administrative burden on the government without added benefit. Furthermore, moving the bright-line attachment rule to include preindictment pleas may pave the path for criminal defendants to argue for an extension of the same right to other preindictment proceedings that this Court has repeatedly refused to recognize as points of attachment.

3. Other constitutional safeguards outside the Sixth Amendment right to counsel jurisprudence exist to protect the rights of defendants.

The Sixth Amendment right to counsel provides a floor, not a ceiling, protection for the accused, not whenever they may benefit from a lawyer's advice. See Burbine, 475 U.S. at 429-30; see also United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992) (the fact that a lawyer's service may be useful in preventing hazards of eyewitness testimonies during preindictment lineups does not justify a constitutional right to counsel). In Burbine, a defendant waived his Fifth Amendment right to counsel and made inculpatory statements during custodial interrogation in the absence of counsel. Id. at 415-16. Although the Court recognized that a confession elicited during police questioning may often seal a suspect's fate, such

concern did not justify a constitutional right to counsel. Id. at 431-32.

Repeatedly, the Court has "declined to depart from its traditional interpretation of the Sixth Amendment right to counsel" in response to policy arguments because other constitutional safeguards protect defendants during pretrial proceedings. See Gouveia, 467 U.S. at 192 (upholding that statute of limitations and Fifth Amendment due process rights afford protection to defendants against the government that deliberately delays formal charges); see also Kirby, 406 U.S. at 691 (explaining that the due process requirements under the Fifth and Fourteenth Amendments forbid unnecessarily suggestive lineups). Moreover, in Miranda, the Court established the right to counsel for suspects under custodial interrogation, requiring the police to explain the right to remain silent and have counsel before initiating any questioning. 384 U.S. at 469-73; see U.S. Const. Amend. V.

In any event, legislatures are free to adopt further protection measures for defendants in addition to well-established constitutional rights. See 18 U.S.C. § 3599(a)(2); see, e.g., Martel v. Claire, 565 U.S. 648, 661-62 (2012) (creating a limited statutory right to counsel in habeas corpus proceedings). In particular to the Sixth Amendment jurisprudence, Congress has legislated beyond the constitutional

right to a speedy trial by enacting the Speedy Trial Act of 1974, which requires specific time limits for completing various stages of a criminal prosecution. See 18 U.S.C. § 3161.

In sum, the policy argument that the Sixth Amendment right to counsel should extend to preindictment pleas because it can be valuable is precisely the line of argument the Court rejected in Burbine. The Sixth Amendment right to counsel guarantees a minimum, but definitive protection for defendants once they are formally charged. Prior to attachment, other constitutional and procedural safeguards protect defendants to ensure the proper administration of justice, with room for legislatures to intervene and provide further protections as they see fit.

C. Robertson's Right to Counsel Did Not Attach at his Preindictment Plea Stage as a Matter of Law Because No Judicial Proceedings Had Commenced Against Him According to the Bright-Line Attachment Rule.

A target letter does not turn a subject of an investigation into an "accused" within the meaning of the Sixth Amendment. United States v. Olson, 988 F.3d 1158, 1163 (9th Cir. 2021); Hayes, 231 F.3d at 674-75 (held that no attachment occurred when a defendant received a target letter and consented to an interview by federal agents). In Olson, a defendant's right to counsel did not attach according to the bright-line attachment rule when he received a target letter that invited him to have

his counsel contact the government if he was 'interested in resolving this matter short of an Indictment.' Id. at 1160-61.

A subject of an investigation does not become an accused within the meaning of the Sixth Amendment when the government offers preindictment pleas. See, e.g., Turner, 885 F.3d at 955; see also Moody, 206 F.3d at 614. In Moody, a suspect voluntarily approached and cooperated with the government after the government successfully searched his home and business under valid warrants. 206 F.3d at 611. He volunteered information about the roles of other targets, and the government offered him a preindictment plea, which he later rejected at the advice of his attorney. Id. However, his Sixth Amendment right to counsel did not attach at a preindictment plea stage because he was an unindicted subject of an investigation. Id. at 614.

Other circuits, such as the First, Third, and Seventh, also have adhered to the bright-line attachment rule in various preindictment contexts. Roberts v. Maine, 48 F.3d 1287, 1291 (1st Cir. 1995) (held that a suspect's right to counsel did not attach at the time he refused to take the blood alcohol test because no formal charges had been brought); Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 892-93 (3d Cir. 1999) (held that the right to counsel attached at a preliminary arraignment proceeding); Larkin, 978 F.2d at 967 (no Sixth Amendment right to counsel at preindictment lineups).

Here, Robertson did not have a Sixth Amendment right to counsel when the government offered a preindictment plea because no formal prosecution had been initiated against him. Like the defendant in Olson who did not turn into an accused when he received the target letter, Robertson did not turn into an "accused" within the meaning of the Sixth Amendment. Furthermore, like the defendant in Moody whose right to counsel did not attach when he received the preindictment offer, Robertson's Sixth Amendment right to counsel did not attach during his preindictment plea negotiation. Preindictment pleas do not trigger the same right to counsel as during postindictment pleas without the commencement of prosecution. Extending the Sixth Amendment right to counsel to the preindictment plea stage only benefits defendants like Robertson who was ready to take a chance and wait until he could further evaluate the government's case against him, only to regret having rejected a favorable preindictment offer. Although preindictment pleas can be an efficient tool, conserving prosecutorial resources and allowing defendants who admit their guilt to receive favorable sentences, the government may be discouraged from offering preindictment pleas if they can open doors to ineffective assistance claims that may end up benefitting defendants who purposely decline the offer in the hopes of avoiding convictions.

13

Applicant Details

First Name	**Nanxi**
Last Name	**You**
Citizenship Status	**U. S. Citizen**
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Address	**Address** Street **100 N Kingshighway Blvd, Apt 1103** City **St. Louis** State/Territory **Missouri** Zip **63108** Country **United States**
Contact Phone Number	**6462728350**

Applicant Education

BA/BS From	**Columbia University**
Date of BA/BS	**May 2018**
JD/LLB From	**Washington University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014**
Date of JD/LLB	**May 1, 2024**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Washington University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Wiley Rutledge Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Shill, Gregory
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Ron, Levin
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Lewis, Jo Ellen
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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The Honorable Juan R. Sánchez
U.S. District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1711

Dear Chief Judge Sánchez:

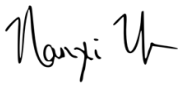
I am writing to apply for a clerkship in your chambers, either beginning in 2024 or for your next available position. I am a rising third-year law student at Washington University School of Law, where I am an Articles Editor for the *Washington University Law Review*. I plan to practice in my home state of New York after I graduate and look forward to returning to the East Coast.

Enclosed please find my résumé, transcripts, and writing samples. The first writing sample is based on a brief I submitted for the Wiley Rutledge Moot Court Competition. The second writing sample is a case comment I completed for the Write-On Competition. The following individuals are submitting letters of recommendation separately.

Professor Ronald M. Levin Washington University School of Law rlevin@wustl.edu (314) 935-6490	Professor Jo Ellen Dardick Lewis Washington University School of Law lewisj@wustl.edu (314) 935-4684	Professor Gregory H. Shill University of Iowa College of Law (Spring 2022 Visiting Professor) gregory-shill@uiowa.edu (319) 335-9057

I would welcome any opportunity to interview with you. Thank you for your time and consideration.

Sincerely,



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EDUCATION

Washington University School of Law — St. Louis, MO
Juris Doctor Candidate | GPA: 3.84 (Top 10%) — May 2024
Honors & Activities: Dean's List (Spring 2022, Fall 2022, Spring 2023)
Highest grade in class for Civil Procedure (Spring 2022)
Washington University Law Review, Vol. 101, Articles Editor
Scholar in Law Award (merit-based scholarship)
Wiley Rutledge Moot Court Competition

Columbia University — New York, NY
Bachelor of Arts in Economics–Political Science | GPA: 3.62 — May 2018
Honors & Activities: Dean's List (4 Semesters)
Graduate School of Journalism, *Administrative Assistant*
Study Abroad, London School of Economics and Political Science

EXPERIENCE

Davis Polk & Wardwell LLP — New York, NY
Summer Associate — May 2023 – Present
- Researched case law and drafted legal memoranda in support of litigation and pro bono matters

Legal Assistant — June 2018 – January 2021
- Drafted and reviewed financial offering documents for client-specific structured investment product issuances linked to equities, rates, indices, commodities, and other market measures
- Facilitated communications between clients and attorneys to prepare and distribute material in a timely manner
- Managed time-sensitive regulatory filings with the Securities and Exchange Commission and attended to client requests related to each filing

Vedder Price P.C. — New York, NY
Summer Associate (Return Offer Extended) — May 2022 – July 2022
- Worked closely with shareholders specializing in transportation finance to draft and review contracts in connection with aircraft transactions
- Assisted in preparation of transactional documents for the Finance & Secured Lending, Mergers & Acquisitions, and Capital Markets groups

Sunset Park Family Health Center at NYU Langone — New York, NY
Early Learning Specialist, AmeriCorps Member — January 2021 – July 2021
- Provided early literacy support and child development guidance to 15 Mandarin-speaking families and children through virtual home visits
- Modeled positive verbal interactions and demonstrated language building strategies with books and toys
- Conducted evaluations of each family's progress in the program and maintained detailed records of home visits

Penn, Schoen, & Berland Associates — New York, NY
Market Research Intern — September 2017 – December 2017
- Assisted project team in quality control reviews for data accuracy in presentations and surveys to eliminate bias and ensure statistical significance
- Collaborated with research and survey teams on questionnaire development for various clients
- Conducted research on client's company and industry, including financials, corporate leaders, and products

SKILLS, INTERESTS & COMMUNITY ENGAGEMENT

ABA Antitrust Section, *Law Student Ambassador* (September 2022 – Present)
ABA Antitrust Section Legislation Monitoring Project, *Volunteer* (October 2020 – May 2021)
Chinese (Fluent) | Oil Painting, Go, Crossword puzzles, Family Karaoke, YouTube cooking videos

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Washington University School of Law

Unofficial Grade Sheet

Fall Semester 2021

Course Title	Instructor	Credit Hours	Grade
Legal Practice I: Objective Analysis and Reasoning	Lewis	2.00	3.88 (A)
Property	D'Onfro	4.00	3.52 (B+)
Torts	Norwood	4.00	3.64 (A-)
Constitutional Law I	Osgood	4.00	3.70 (A-)

Fall Semester GPA: 3.66
Cumulative GPA: 3.66

Spring Semester 2022

Course Title	Instructor	Credit Hours	Grade
Legal Research Methodologies II		1.00	(Pass)
Legal Practice II: Advocacy	Lewis	2.00	3.88 (A)
Contracts	Shill	4.00	3.88 (A)
Criminal Law	Diamantis	4.00	3.76 (A)
Civil Procedure	Levin	4.00	4.24 (A+)
Negotiation	Reeves	1.00	(Pass)

Spring Semester GPA: 3.95 ***(Dean's List)***
Cumulative GPA: 3.80

**This grade sheet has been self-prepared by the above-named student. I affirm the accuracy of all information contained herein. I will bring a copy of an unofficial and official transcript at the time of any scheduled interview or forward one upon request.*
For any questions, please feel free to contact me using the information listed above. Thank you.

Fall Semester 2022

Course Title	Instructor	Credit Hours	Grade
Evidence	Rosen	3.00	3.76 (A)
Federal Courts	Hollander-Blumoff	4.00	4.18 (A+)
Mediation Theory and Practice	Kuchta-Miller	3.00	3.58 (A-)
Pretrial Practice and Settlement	Walsh	3.00	3.94 (HP)
Law Review		1.00	
Moot Court		1.00	

Fall Semester GPA: 3.89 ***(Dean's List)***
Cumulative GPA: 3.83

Spring Semester 2023

Course Title	Instructor	Credit Hours	Grade
Administrative Law	Levin	3.00	4.00 (A+)
Legal Profession	Joy	3.00	3.52 (B+)
Antitrust	Drobak	3.00	4.06 (A+)
International Money Laundering, Corruption, and Terrorism	Fagan/Delworth	3.00	3.88 (A)
Topics in Health Insurance Law and Regulation	Schwarcz	1.00	3.76 (A)
Law Review		1.00	

Spring Semester GPA: 3.86 ***(Dean's List)***
Cumulative GPA: 3.84

**This grade sheet has been self-prepared by the above-named student. I affirm the accuracy of all information contained herein. I will bring a copy of an unofficial and official transcript at the time of any scheduled interview or forward one upon request.*
For any questions, please feel free to contact me using the information listed above. Thank you.

THE UNIVERSITY OF IOWA

COLLEGE OF LAW

280 Boyd Law Building
Iowa City, Iowa 52242-1113

October 6, 2022

Re: Recommendation for Nanxi You

Dear Judge:

I am writing to recommend Nanxi You for a clerkship in your chambers. She is a sharp student and an engaged, eager participant in class discussions, and I am confident she would make a terrific addition to your chambers.

I came to know Ms. You while I was teaching as a Visiting Professor at Washington University School of Law in Spring 2022. She was an active voice in my Contracts class, always prepared when cold-called and also volunteering often (but not too often). When she spoke in class, her comments displayed a high level of preparation and engagement with the material. My class that semester had approximately 90 students (and all classes at the school were on Zoom for the first two weeks due to Omicron), so my ability to comment with specificity on the participation of individual students is somewhat less than I would like, but Ms. You nevertheless distinguished herself in class in participation as well as her final grade. I also came to know her during office hours and by email, where she posed questions that indicated that she had given a lot of thought to the material we were studying. In every interaction, she has been thoughtful, hardworking, highly motivated, and courteous.

As a former practicing lawyer and law clerk, I believe Ms. You has a very bright future in practice and would make an outstanding contribution to your chambers. Please do not hesitate to contact me if you would like to discuss her candidacy further.

Sincerely,

/s/
Gregory Shill
Professor of Law
University of Iowa College of Law
gregory-shill@uiowa.edu
(319) 335-9057

Washington University in St. Louis
SCHOOL OF LAW

August 31, 2022

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

RE: Recommendation for Nanxi You

Dear Judge Sanchez:

Nanxi You, a student in the Washington University School of Law class of 2024, has asked me to write in support of her application to serve as a law clerk in your chambers after her graduation. I am happy to recommend her to you.

Nanxi was a student in my Civil Procedure class in the spring of 2022. She received the highest score in her class of 90 students, with a grade of A+. In her exam paper, which I have reread for the purpose of writing this letter, she displayed a consistently strong familiarity with the statutes, rules, and doctrines covered in the course. All of her analyses were thoughtful and dispassionate. She got to the heart of each question and discerned a number of nuances that most students overlooked. In addition, her essays were straightforward, well organized, and concise, with a very readable and mature prose style.

I have also had conversations with Nanxi outside of class. She is sophisticated, intellectually curious, and highly engaged with issues of legal doctrine and practice. She looks forward to eventually becoming a litigator, probably specializing in the antitrust area. She has already gotten involved in several projects in the antitrust sphere, and she projects enthusiasm for continuing along that path. In addition, she comes across as friendly and good humored, and I expect you would enjoy working with her.

In short, I believe that Nanxi is highly qualified for a good clerkship, and I hope you will give her serious consideration. Please feel free to be in touch with me if you think I can furnish any other information that might be helpful.

Best,

/s/

Ronald Levin
William R. Orthwein Distinguished Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Washington University in St. Louis
SCHOOL OF LAW

September 8, 2022

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

RE: Recommendation for Nanxi You

Dear Judge Sanchez:

I am writing this letter on behalf of Nanxi You as I understand that she has applied for a clerkship with you. I enthusiastically, and without qualification, recommend Nanxi for a clerkship. Nanxi is an outstanding researcher and writer, self-motivated and a delight to work with. Nanxi was one of fifty-three students in my first year required Legal Practice class during the 2021-22 academic year. Nanxi's research skills, written work product, and oral presentation skills were in the top 20% of my class in the fall and in the top 7% in the spring.

Nanxi's grade for the fall semester was based on drafting one major client advisory letter, and one major memorandum, as well as several shorter written assignments. The client advisory letter was "closed," meaning that the students were not required to do any original research and the memorandum was "open," that is, the students were required to do their own original research in order to draft the memorandum. In the spring, Nanxi's written projects included a "closed" trial court brief, an oral argument on that brief, and an "open" research appellate brief.

In addition to the written assignments in Legal Practice, Nanxi had to complete two individual oral research presentations. For the presentations, she had to independently research several issues based on a hypothetical problem, determine the relevant research results that would assist her in making a prediction for the client, and then present those results to me in person in an individual meeting. Nanxi did an excellent job of discerning the relevant issues and finding case law that resolved those issues. She was very poised and confident in her presentations. She did a great job of walking me through her research results, answering my questions and providing a prediction and advice for the clients. Nanxi's score on her individual research presentations improved dramatically from the fall to the spring – a sign that she absorbed the constructive criticism from her first presentation and applied it to her second presentation.

Nanxi took the initiative in her educational endeavors. For example, she took advantage of every opportunity to meet with me to ask questions about her written draft assignments. For her meetings with me, Nanxi made sure her draft was as complete as possible. She came to the meeting with specific questions and suggested answers. She asked insightful questions during her individual meetings that demonstrated she had thought about the material. As another example of her initiative, Nanxi told me that by changing the way she studied for classes, she improved her GPA dramatically from first to second semester. Nanxi has the ability to listen and embrace constructive criticism – a skill that will serve her well as a lawyer.

Because of the small group nature of my class, I had the opportunity to get to know and observe Nanxi on a personal, as well as professional level. She was always supportive of her fellow students in a non-competitive manner. Nanxi listens carefully to what others have to say and if she disagrees, does so in a respectful, thoughtful manner.

At WashULaw, students are asked to submit a clerkship recommendation request form to faculty when requesting a clerkship recommendation. The form requires students to think about why they are applying for a clerkship. Nanxi's clerkship recommendation request is the most detailed request I have seen which indicates to me that she has thought very deeply about why she wants to clerk. In her request, she noted that the believes that "clerking is an opportunity to learn about different areas of the law while thinking through challenging issues and helping judges make decisions that shape common law." She also stated that she believed "clerking would help develop a better sense of what should and should not do in practice." Both of those reasons, as well as others she noted, make sense to me and are the kinds of reasons I would want a potential clerk to identify.

In short, Nanxi is a very highly self-motivated, hard-working student who consistently strives to do her best. She was always open to suggestions and eager to improve her research and writing skills for her own educational reasons, not for a grade.

I was delighted to learn that Nanxi was applying for a clerkship with you. She is truly an outstanding student, exhibits a love of learning and is delightful to work with. Therefore, I enthusiastically and highly recommend that you hire Nanxi You as your law clerk. Please call me if you have any questions regarding this letter or Nanxi's qualifications for a clerkship.

Jo Ellen Lewis - lewisj@wustl.edu - 314-935-4684

Best,

/s/

Jo Ellen Dardick Lewis
Professor of Practice

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
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Nanxi You
n.you@wustl.edu | 646-272-8350

School:
100 N Kingshighway Blvd. Apt. 1103
St. Louis, MO 63108

Permanent:
82-19 Grenfell Street
Kew Gardens, NY 11415

WRITING SAMPLE 1

The following writing sample is based on a brief submitted for the Wiley Rutledge Moot Court Competition. My partner and I represented the respondent, the West Canaan Unified School District (the "District"), in a petition for writ of certiorari filed by Maureen Moxon ("Petitioner"), as next friend to her minor child K.M., for the following issues:

I. Whether the parent of a student who refuses to participate in a prayer led by an on-duty public school employee has standing, as next friend of her child, to assert a violation of the Establishment Clause; and

II. Whether it is a violation of the Establishment Clause for a public school district to permit an employee to lead a prayer among students participating in a school-sponsored activity.

Bud Kilmer ("Kilmer") is a coach of the football team at West Canaan High School, a public school (the "School") within the District's jurisdiction. Since at least 2002, Kilmer has made it a practice to lead his players in a traditional Christian prayer in the locker room before the start of each football game. K.M., who is agnostic and does not ascribe to any religious belief, joined the School's football team in 2021.

When K.M. requested that Kilmer stop leading the students in prayer because he was not comfortable reciting it, Kilmer told him that he was not going to stop because the prayer was a longstanding tradition, and it would not be fair to the other players on the team who wanted to join in the prayer if he were to stop leading it. He further told K.M. that it was up to K.M. whether he wanted to join the prayer, but was encouraged to for team unity. K.M. chose to not recite the prayer and to remain seated during the prayer, leading to ridicule by his teammates.

When Petitioner requested the District to prohibit Kilmer from leading the prayer, the District informed her that it would not take action. Petitioner then brought suit under 42 U.S.C. § 1983, claiming that the District's policy of permitting Kilmer to lead prayer violated the Establishment Clause and requesting that the District and Kilmer be enjoined from leading students in prayer. The District Court for the Eastern District of Texasota entered a judgement for Petitioner. The Court of Appeals for the Twenty-First Circuit reversed, holding that while Petitioner had standing to challenge the District's practice of permitting its employee to lead students in prayer in connection with a school-sponsored activity, the District's practice did not violate the Establishment Clause.

For purposes of this writing sample, I have deleted the Table of Authorities, Questions Presented, Jurisdictional Statement, Constitutional Provisions and Statutes, Statement of the Case, and Issue I. The discussion of Issue I has been removed from the Summary of the Argument section. This writing sample is my own work product and has not been substantially edited by any other person.

Nanxi You

No. 22-105

In the Supreme Court of the United States

MAUREEN MOXON, AS NEXT FRIEND OF K.M., A MINOR CHILD, PETITIONER
v.
WEST CANAAN UNIFIED SCHOOL DISTRICT, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TWENTY-FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

Team No. 4

October 7, 2022

Nanxi You

TABLE OF CONTENTS

Nanxi You

QUESTIONS PRESENTED

[Intentionally Deleted]

PARTIES ON APPEAL

Petitioner Maureen Moxon ("Petitioner"), as next friend to K.M., a minor child, was the plaintiff below and appellee below. Respondent West Canaan Unified School District (the "District") was the defendant and appellant below.

OPINIONS BELOW

The decisions of the District Court for the Eastern District of Texasota (the "District Court") and the Court of Appeals for the Twenty-First Circuit (the "Circuit Court") are included in the attached record at 4–8 and 10–15 respectively.

JURISDICTIONAL STATEMENT

[Intentionally Deleted]

CONSTITUTIONAL PROVISIONS AND STATUTES

[Intentionally Deleted]

STATEMENT OF THE CASE

[Intentionally Deleted]

SUMMARY OF THE ARGUMENT

The District did not violate the Establishment Clause by allowing Coach Kilmer ("Kilmer") to lead pregame prayers. The facts of this case are similar to the ones that were presented in *Kennedy v. Bremerton*, in which this Court did not find an Establishment Clause violation when a coach invited students to join his postgame prayer on the field in public. 142 S. Ct. 2407, 2433 (2022). Here, Kilmer led pregame prayers in the locker room in private. The most important fact that this case shares with *Kennedy* is that the prayer was voluntary, not coercive. Through a

historical understanding of the purpose of the Establishment Clause, the Establishment Clause is only concerned with government practices that coerce people into adopting religion through threat of penalty. Here, it was entirely up to K.M. whether he wanted to join in the prayer. Even if he felt peer pressure to join in, this pressure is not considered coercion by Establishment Clause standards.

This Court has also analyzed Establishment Clause cases through other tests that focus on whether the challenged government practice had a purpose of advancing religion and whether it would be perceived as endorsing or approving religion. But even through these alternative tests, which this Court has disfavored, the District policy of permitting Kilmer's prayer was allowed by the Establishment Clause. The Establishment Clause must be interpreted in a way that is tolerant of religious expression, rather than requiring the government to censor anything that relates to religion. This approach better situates the Establishment Clause with the free speech and free exercise rights guaranteed by the First Amendment. Thus, the Establishment Clause is not violated when Kilmer merely extended an *invitation* for students to join his private prayer—an invitation to pray is vastly different from a requirement to pray.

ARGUMENT

I. [INTENTIONALLY DELETED]

II. THE DISTRICT COMPORTED WITH THE REQUIREMENTS OF THE ESTABLISHMENT CLAUSE BY PERMITTING A HIGH SCHOOL COACH TO LEAD STUDENTS IN A PREGAME PRAYER.

The First Amendment forbids the government from any practice that amounts to "an establishment of religion" or any practice "prohibiting the free exercise thereof." *U.S. Const. amend. I.* As a threshold matter, Kilmer's pregame prayer does not fall within the scope of the Establishment Clause because it is private speech that is not attributable to the District. But even

if Kilmer's prayer constituted government speech, the District's policy of permitting his prayer did not violate the Establishment Clause under any of the approaches that this Court has adopted in analyzing Establishment Clause cases.

A historical approach to interpreting the Establishment Clause is necessary because it recognizes that there are many religious practices that have historically been allowed under the Establishment Clause. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 670 (1989) (Brennan, J., dissenting). Under a historical approach, the District can permit Kilmer's prayer without violating the Establishment Clause. Therefore, this Court should affirm the Circuit Court's judgement that the District's policy of permitting Kilmer's prayer comported with the requirements of the Establishment Clause.

A. The District's neutral policy of permitting private religious speech comports with the requirements of the Establishment Clause.

The Constitution does not mandate or permit the District to suppress private religious speech. *Kennedy*, 142 S. Ct. at 2433. As this Court has noted, "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990). This Court has further consistently held that "it is no violation for government to enact neutral policies that happen to benefit religion." *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 764 (1995).

1. Kilmer's prayer constitutes private religious speech that is not attributable to the District.

Because Kilmer's prayer did not fall within the scope of his duties as a coach, it is private speech that is protected by the First Amendment. *See Lane v. Franks*, 573 U.S. 228, 235–42 (2014)

(when a government employee's speech is not ordinarily within the scope of his duties, it is private speech that is protected by the First Amendment); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (whether speech is within scope of employee's duties depends on if the speech was part of what he was employed to do). Even when Kilmer was on duty as a coach, he was free to engage in private speech. *Kennedy*, 142 S. Ct. at 2425. In *Kennedy,* a football coach engaged in prayers on the field after games, to which students on the team asked to join; even though he was still on duty and served as a role model, this Court recognized the coach's prayers as private speech because he was not trying to convey a government-created message, instructing players, discussing strategy, or engaging in any speech that the school paid him to perform as a coach.

Kilmer's prayer is similar to the prayer at issue in *Kennedy*. The District did not pay Kilmer to say his prayer—it was not part of his coaching duties. Crucially, this Court recognized in *Kennedy* that the coach shouldn't be expected to "shed [his] constitutional rights" upon entering school grounds. 142 S. Ct. at 2423 (quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969)). This is equally applicable to Kilmer's right to speech: even if he was on duty before the games and was serving as a role model to the students while in the locker room, Kilmer had a right to his religious expression. If the District censored Kilmer's prayer, it would violate the Free Speech and Free Exercise Clauses, as this Court held for the prayer at issue in *Kennedy*. Moreover, the fact that Kilmer's prayer might be perceived as government speech does not actually make his prayer attributable to the District. *See Capitol Square Review*, 515 U.S. at 764–69 (rejecting a "transferred endorsement" principle where private expression violates Establishment Clause because it might be mistaken for officially endorsed religious expression, since policymakers would find themselves "in a vise between the Establishment Clause on one side and the Free Speech and Free Exercise clauses on the other").

Nanxi You

While this Court has invalidated school prayers on Establishment Clause grounds, it has done so because they were endorsed by the government. *See Sante Fe Independent School District v. Doe*, 530 U.S. 290, 294–99 (2000) (school declared a policy that student elections must take place to select a chaplain to lead invocations at football games, which were delivered in an official setting over the school's public address system, and forcefully suggested that the invocation was to be a public prayer); *Lee v. Weisman*, 505 U.S. 577, 587–90 (1992) (principal's decision that prayers should be given and his selection of clergy for an official school graduation ceremony are choices attributable to the state, so government involvement with religious activity was pervasive); *Engel v. Vitale*, 370 U.S. 421 (1962) (a short prayer recommended by the New York Board of Regents for students at the start of each school day was an impermissible establishment of religion). In contrast, as the District stated in its correspondences with the Petitioner, it adopted a completely neutral position such that "while [K.M.] remains free not to participate in the prayer if he does not want to, Coach Kilmer and the other players equally have the right to engage in such a traditional pregame prayer if they wish to." R. at 5. The District did not institute a policy of mandating prayer, so in no sense was the District pervasively involved in Kilmer's prayer. Kilmer's prayer is not attributable to the District because the District did not implicitly or explicitly encourage Kilmer to lead his prayer.

2. <u>In permitting Kilmer's prayer, the District comported with the Establishment Clause by ensuring neutrality towards religion.</u>

The District's policy of permitting private religious speech on a nondiscriminatory basis does not violate the Establishment Clause. On the contrary, this Court has noted that the "First Amendment mandates governmental neutrality…between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). *See also Mergens,* 496 U.S. at 248–49 (a state law that

prohibited schools from denying access to facilities to students who wanted to form clubs on the basis of religious speech at club meetings did not violate the Establishment Clause because the law granted equal access to both non-religious and religious speech); *Capitol Square Review*, 515 U.S. at 770 (permitting a private display of a religious symbol in a public forum did not violate the Establishment Clause because the public forum was open to everyone on equal terms).

In order for the District to comply with the First Amendment, it must be neutral. Neutrality means that it extends equal access to religious and nonreligious viewpoints. If the District censored private religious speech, it would be in danger of violating the Free Exercise and Free Speech Clauses because it would show hostility towards religion. *See Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384, 390–94 (1993) (school district's preclusion of private group from presenting films at the school based on the films' religious views violated the Free Speech Clause). In permitting Kilmer's prayer, the District granted equal access to both private religious and nonreligious speech. On its face, the District's policy is neutral because it neither endorses nor disapproves of religion, similar to the policies at issue in *Mergens* and *Capitol Square Revie*w; Kilmer and the students were all equally allowed to express their religious or non-religious viewpoints, and no one was forced by the District to adopt any particular viewpoint. Thus, permitting Kilmer's prayer did not mean that the District discriminated in favor of private religious expression. This is the case even if the District's policy happened to incidentally benefit religion. *See Capitol Square Review*, 515 U.S. at 763–65 (a policy that benefits religion does not count as sponsoring the private group's expression).

B. Even if Kilmer's prayer constitutes government-sponsored speech, the District's policy of permitting his prayer comported with the Establishment Clause under all of the approaches that this Court has adopted in analyzing Establishment Clause cases for government-sponsored speech.

This Court has taken three different approaches for Establishment Clause cases for government-sponsored speech. Under this Court's most recent approach in *Kennedy*, which looked to a historical understanding of the Establishment Clause, the District did not violate the Establishment Clause because it did not coerce K.M. into participating in the prayer. Under the test that this Court adopted in *Lemon v. Kurtzman* (the "*Lemon* test"), the District still did not violate the Establishment Clause because its policy of permitting Kilmer's prayer did not have the effect of advancing religion, was not perceived as advancing religion, and was not excessively entangled with religion. Under the modified version of the *Lemon* test that this Court adopted in *County of Allegheny* (the "endorsement test"), the District still did not violate the Establishment Clause because it did not endorse any religion. Given that this Court has expressly declined to apply the *Lemon* test or ignored it in the past due to its shortcomings, a historical understanding of the Establishment Clause is necessary. *See American Legion v. American Humanist Ass'n,* 139 S. Ct. 2067, 2080 (2019).

Nanxi You

1. Under the Court's most recent approach in *Kennedy*, the District's policy of permitting Kilmer's prayer comported with the Establishment Clause because it did not coerce students into participating in the prayer.
    a. The Establishment Clause only prohibits the District from coercing students into participating in Kilmer's prayer.

As this Court instructed in *Kennedy*, the Establishment Clause must be interpreted with reference to historical practices and understandings rather than through the *Lemon* test, which the Court "long ago abandoned." 142 S. Ct. at 2427. Even before *Kennedy*, this Court stated that its interpretation of the Establishment Clause "has comported with what history reveals was the contemporaneous understanding of its guarantees," rather than be confined to just the *Lemon* test. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

Through a historical understanding of the Establishment Clause, the District is only prohibited from coercing students into participating in prayer. Historically, the Establishment Clause prohibited coercion "by force of law and threat of penalty." *Weisman,* 505 U.S. at 640 (Scalia, J., dissenting). Specifically, it prohibited coercive state establishments that "exercised government power in order to exact financial support of the church, compel religious observance, or control religious doctrine." *Town of Greece v. Galloway*, 572 U.S. 565, 608 (2014). Thus, the Establishment Clause was concerned with the government's legal coercion, such as limiting political participation to established church members and levying taxes to generate church revenue. *Id.* at 608. Given this historical understanding, the District could only violate the Establishment Clause if it coerced students into participating in the prayer, in a similar manner to how coercive state establishments historically compelled religious observance: under force of law and threat of penalty. This is because, when there is no coercion, "the risk of infringement of religious liberty

by passive or symbolic accommodation is minimal." *County of Allegheny,* 492 U.S. at 662 (Brennan, J., dissenting).

b. K.M. was not coerced into participating in Kilmer's prayer.

K.M. was not coerced into participating in Kilmer's prayer because it was entirely voluntary. In *Kennedy*, this Court pointed to the fact that not a single student joined the coach's prayers during the games for which he was disciplined as evidence that he did not coerce them to join him in praying. 142 S. Ct. at 2430. It emphasized that, based on a historical understanding of the Establishment Clause, mere visible religious conduct by the coach is not impermissibly coercive on students. *Id.* at 2431. Similarly, Kilmer did not compel K.M. to join his prayer. Like in *Kennedy*, K.M. was never required to participate because Kilmer told him that it was "up to" K.M. if he wanted to join. R. at 2. K.M. himself evidently did not think that he was required to participate, and was not pressured into participating, since he chose to not say the prayer and to remain seated during the prayer. R. at 2.

Moreover, the District did not coerce K.M. into participating in the prayer by merely exposing him to the prayer, even if he did not want to participate in it. *See Zorach v. Clauson*, 343 U.S. 306, 311–12 (1952) (public school program permitting students to spend time in private religious classrooms off campus was not coercive because they were not required to attend religious classrooms and school did not persuade or force students to participate in religious classrooms); *Town of Greece*, 572 U.S. at 588–90 (town board's practice of prayers during the ceremonial portion of its meetings was not coercive because lawmakers did not single out dissidents, direct the public to participate, force the public to stay in the room during prayers, or indicate that their policymaking would be influenced by whether or not a person participated in the prayers). Thus, coercion does not occur when students like K.M. are given the option of

participating in religious activity, which they can always choose to disregard. Moreover, neither offense nor peer pressure from being subjected to Kilmer's prayer constitutes coercion. *See Town of Greece*, 572 U.S. at 589–90 (even if the prayers gave the audience members offense and made them feel excluded and disrespected by exposing them to prayers that they would rather not hear, this offense was not coercion).

Similar to *Town of Greece*, the District did not coerce K.M. into joining Kilmer's prayer because the District did not treat K.M. differently from other students for not praying. Historically, Kilmer's prayer would not have been coercive because K.M. was not punished by "force of law" or "threat of penalty." When Kilmer told K.M. that "it would be best for team unity" if K.M. joined in the prayer (R. at 2), he only suggested that K.M. join in the prayer, and his intention was to foster inclusiveness and team unity, rather than trying to convert non-believers like K.M. Specifically, Kilmer indicated to K.M. that the prayer was a longstanding tradition that he had started at the school over twenty years ago. R. at 1–2.

2. Under the *Lemon* test and the endorsement test, the District's policy of permitting Kilmer's prayer still comported with the Establishment Clause.

In *Lemon v. Kurtzman*, this Court created a three-part test to determine whether a government practice is deemed constitutional under the Establishment Clause: (1) the practice must have a secular purpose, (2) the primary effect of the practice must be one that "neither advances nor inhibits religion," and (3) the practice must avoid "excessive governmental entanglement with religion." 403 U.S. 602, 612–13 (1971). In *County of Allegheny*, this Court adopted the endorsement test, in which a government practice is a violation of the Establishment Clause if it has the effect of endorsing religion; the effects of a government practice depends on whether a reasonable observer would conclude that the government is conveying a message that

religion is favored or preferred. 492 U.S. at 630–31 (O'Connor, J., concurring). Under either the *Lemon* test or the endorsement test, the District still comported with the Establishment Clause.

a. The District's policy of permitting Kilmer's prayer has a secular purpose.

In permitting Kilmer's prayer, the District was not motivated by the advancement of religion. *Compare Lynch*, 465 U.S. at 680–81 (city's display of a creche has a legitimate secular purpose because the display was sponsored by the city to celebrate Christmas, which is a tradition that is recognized as a national holiday) *with Wallace v. Jaffree*, 472 U.S. 38, 56–57 (1985) (statute authorizing period of silence for voluntary prayer in public schools was invalid because, as lawmakers expressed, the *only* purpose for the enactment was to return voluntary prayer to schools). Unlike the statute in *Jaffree*, the purpose of the District's policy was to honor team tradition and foster team unity, which are secular purposes. The District's policy of not taking action with respect to Kilmer's prayer also served a broader secular purpose of fostering "mutual respect and tolerance…for religious and non-religious views alike." *Kennedy*, 142 S. Ct. at 2416.

That the District's policy may have created incidental benefits to religion, by giving Kilmer a platform to encourage students to join the prayer, does not diminish the secular purpose of the policy. *See Lynch*, 465 U.S. at 680. *See also Board of Education v. Allen*, 392 U.S. 236, 241 (1968) (statute requiring provision of free textbooks to be issued to all students in public and private parochial schools is valid because the purpose of the statute was to further students' education). Here, a policy of accommodating religious and non-religious views alike was not motivated by religious purpose, even if the policy benefitted Kilmer and religious students.

b. The District's policy of permitting Kilmer's prayer did not have the effect of advancing or inhibiting religion, and a reasonable observer would not think that the District was endorsing religion.

Nanxi You

Under the endorsement test, a reasonable observer would not think that the District was endorsing religion because refusal to prohibit Kilmer's prayer is not the same as affirmatively approving his prayer. *Compare Lynch*, 465 U.S. at 683 (city's display of a creche alongside purely secular symbols is no more an advancement or endorsement of religion than legislative recognition of the origins of the Christmas holiday or the "exhibition of literally hundreds of religious paintings in governmentally supported museums") *with County of Allegheny*, 492 U.S. at 598 (city's creche display communicated an unmistakably religious message because it was the only item on display and included a sign that said, "Glory to God in the Highest!").

Here, a reasonable observer would not think that the District's policy is conveying a message that religion is favored or preferred. High school students, regardless of their religious views, would understand that the District's accommodation of the prayer is to ensure that there is a neutral policy – the exact opposite of advancing or inhibiting religion. *See Mergens*, 496 U.S. at 250 (noting that secondary school students are mature enough to understand that schools "do not endorse everything they fail to censor"). Whereas the creche in *County of Allegheny* conveyed an unmistakably religious message, the District did not convey any unmistakably religious message because it never expressed that it preferred religious adherents over non-adherents.

c. <u>The District's policy of permitting Kilmer's prayer did not create excessive governmental entanglement with religion.</u>

The District's policy did not create excessive government entanglement with religion because there was no "intimate and continuing relationship between church and state." *Lemon*, 403 U.S. at 622. *Compare Lynch*, 465 U.S. at 684 (finding no entanglement in city's creche display because city did not contact church authorities about the content of the display prior to or after its purchase of the creche and city's material contribution to the creche was *de minimis*) *with Lemon*,

403 U.S. at 619–20 (state statutes providing financial support to church-related educational institutions fostered excessive entanglement with religion because they required continuing state surveillance to determine which expenditures were religious and which were secular).

Like in *Lynch*, the District was far removed from religion because it did not provide any material support to Kilmer for leading his prayer, let alone encourage or ask him to lead his prayer. As this Court expressed in *Lynch*, a litigant cannot "create the appearance of [political] divisiveness and then exploit it as evidence of entanglement." 465 U.S. at 684–85. Here, K.M. has created the appearance that the District's neutral policy is a pretext for supporting religion, when it is actually directed towards maintaining everyone's right to religious expression. Thus, this false appearance cannot be used as evidence of entanglement when the District has not provided any support, material or otherwise, to Kilmer for the purpose of leading prayer.

C. The Court should adopt a historical approach to the Establishment Clause, under which the District's policy of permitting Kilmer's prayer is so rooted in national tradition that it comports with the Establishment Clause.

1. The District's policy of permitting prayer is so rooted in national tradition that it comports with the Establishment Clause.

From a historical approach, the practice of voluntary school prayer would have been permitted under the Establishment Clause. In *Marsh v. Chambers*, this Court held that a state legislature's practice of employing a legislative chaplain to open each legislative session with a voluntary prayer comported with the Establishment Clause because Congress had opened sessions with a prayer for over 200 years, and many state legislatures followed suit. 463 U.S. 783, 786–92 (1983). This historical evidence showed that the drafters of the First Amendment did not intend for the Establishment Clause to apply to legislative prayers, and that the practice of legislative

prayers is "part of the fabric of our society." *Id.* at 792. *See also Town of Greece*, 572 U.S. at 576 ("That the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society").

Voluntary school prayers such as the one that Kilmer led has similar historical roots as legislative prayers. As the District noted, "[pregame] prayers are commonly said in locker rooms all across the country and have been for generations." R. at 5. *See also Weisman*, 505 U.S. at 631–32 (Scalia, J., dissenting) (noting that prayer at graduation ceremonies is a longstanding American tradition). Prayers, regardless of whether they are school or legislative, are a part of the fabric of our society because they have existed for so long. Just as the Framers saw legislative prayers as a "benign acknowledgement" of the role of religion in society, they also would have seen Kilmer's prayer as an acknowledgement of the role of religion in creating team unity for high school football teams. This kind of acknowledgement does not amount to establishment or endorsement of religion, because as this Court noted in *Marsh*, prayers "presents no more potential for establishment than the provision of school transportation…or tax exemptions for religious organizations." 463 U.S. at 791.

2. A historical approach to interpreting the Establishment Clause is better suited than the *Lemon* test and endorsement test in delineating the boundaries of the Establishment Clause.

A historical approach recognizes that tolerance for voluntary school prayers promotes the right to religious expression. *See Kennedy*, 142 S. Ct. at 2416. When this Court has used a historical approach in interpreting the Establishment Clause, it has emphasized that the government has an interest in cultivating respect for others' religious expressions. *See American Legion,* 139 S. Ct. at

2084–85 ("A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion"). *See also Weisman*, 505 U.S. at 638 (Scalia, J., dissenting) (arguing that a non-adherent's interest in avoiding the false appearance of participating in a school prayer does not trump the government's interest in fostering respect for religion generally).

A historical approach recognizes that the District should not be required to insulate students from all things that have even the slightest religious significance. *See Town of Greece*, 572 U.S. at 591 (the purpose of a prayer during the ceremonial portion of the meeting is to merely acknowledge the "central place" that religion holds in people's lives rather than to coerce nonbelievers). Likewise, voluntary school prayers, especially pregame prayers like the one Kilmer led, serve a ceremonial purpose. Pregame prayers serve as an acknowledgement of the role of religion for team unity and tradition. School prayers are a part of heritage, no different from "the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' at the opening of this Court's sessions." *Town of Greece*, 572 U.S. at 587.

CONCLUSION

The District respectfully requests that this Court dismiss Petitioner's claim for lack of standing or affirm the Circuit Court's decision on the Establishment Clause claim.

Respectfully Submitted,

Dated: October 7, 2022

/s/Team No. 4

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WRITING SAMPLE 2

The following writing sample is based on a case comment submitted for the Write-On Competition at Washington University School of Law in May 2022. I was provided with a packet of "closed universe" materials to analyze the Ninth Circuit's approach to the issue of whether patients and health insurance companies who brought a civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO) against pharmaceutical companies adequately established the required element of proximate cause. The Ninth Circuit's holding in *Painters & Allied Trades District Council 82 Health Care Fund v. Takeda Pharmaceuticals Co.* contributed to a circuit split over the central question of whether the decisions of prescribing physicians were intervening causes that severed the chain of causation between the pharmaceutical companies' allegedly fraudulent conduct and the harm to patients and health insurance companies.

For purposes of this writing sample, I have condensed my discussion of the development of the law leading up to the case under review.

The citations follow Bluebook rules. This writing sample is my own work product and has not been edited by any other person. Based on my performance in the Write-On Competition, the *Washington University Law Review* offered me a position as a Staff Editor.

Nanxi You

THE INTERPRETATION OF PROXIMATE CAUSATION UNDER CIVIL RICO:
Painters & Allied Trades District Council 82 Health Care Fund v. Takeda Pharmaceuticals Co.,
943 F.3d 1243 (9th Cir. 2019)

The Racketeer Influenced and Corrupt Organizations Act (RICO) allows private parties to bring civil suits for treble damages.[1] To recover for a civil RICO violation under 18 U.S.C. § 1962, a plaintiff must prove that the defendant, through the commission of two or more acts constituting a pattern of racketeering activity, directly or indirectly invested in, or maintained an interest in, or participated in an enterprise whose activities affect interstate or foreign commerce.[2] To have standing under 18 U.S.C. § 1964(c), a plaintiff must show that he was injured "in his business or property by reason of a violation of section 1962."[3] While it has been established that the language "by reason of" requires a plaintiff to prove proximate cause, courts have disagreed on how such a proximate cause test should be applied.[4] In *Painters & Allied Trades District Council 82 Health Care Fund v. Takeda Pharmaceuticals Co.*,[5] the Ninth Circuit concluded that pharmaceutical companies' allegedly fraudulent misrepresentation of a drug's known safety risk proximately caused RICO harm to patients and health insurance companies.

Five patients and a third-party payor (TPP) of health benefits to covered members filed a class action suit against Takeda Pharmaceuticals USA, Inc., its parent company Takeda Pharmaceutical Company Ltd., and Eli Lilly & Co.[6] The plaintiffs alleged that the defendants conspired to commit mail and wire fraud by intentionally misleading physicians, consumers, and TPPs to believe that a diabetes drug that the defendants developed and marketed did not increase a consumer's risk of developing bladder cancer.[7] The plaintiffs sought to recover economic damages under RICO for the payments they made to purchase the drug, Actos, which they claimed they would not have purchased had they known that it increased their risk of developing bladder cancer.[8] The District Court for the Central District of California dismissed the RICO claims, reasoning that the plaintiffs failed to sufficiently establish that the defendants' acts were the

proximate cause of their damages.[9] On appeal, the Ninth Circuit reversed and held that the plaintiffs adequately established RICO proximate cause: while the prescribing physicians and pharmacy benefit managers were intermediaries between the defendants' fraudulent conduct and the plaintiffs' payments for the drug, they did not constitute intervening causes that broke the chain of causation.[10]

The Supreme Court first interpreted § 1964(c) to require a proximate cause element in *Holmes v. Securities Investor Protection Corp.*[11] To establish proximate cause, the Court required a direct relation between the injury asserted and the injurious conduct alleged.[12] It provided three reasons why a direct relation was necessary to establish proximate cause. First, the less direct an injury is, the more difficult it is to ascertain the amount of a plaintiff's damages attributable to the violation as opposed to other independent factors.[13] Second, allowing recovery for indirectly injured parties would force courts to adopt complicated rules to apportion damages among plaintiffs, or else run the risk of multiple recoveries.[14] Third, the goal of deterring injurious conduct is furthered by counting on directly injured victims to bring their claims without the same issues facing remotely injured parties.[15]

However, the Court did not completely bar recovery for victims of third-party fraud. In *Bridge v. Phoenix Bond & Indemnity Co.*,[16] the defendants were bidders at a tax lien auction who allegedly violated a county rule that prohibited bidders from using agents to submit simultaneous bids and furnished fraudulent compliance affidavits.[17] The Court held that plaintiffs, who were other bidders in the tax sales, could adequately establish proximate cause even though the misrepresentations were made to the county.[18] Notably, it argued that it was a "foreseeable and natural consequence of [defendants'] scheme…that other bidders would obtain fewer liens" and

distinguished the case from *Holmes* in that there were no independent factors that accounted for the plaintiffs' injury.[19]

Lower courts have diverged in their interpretation of the proximate cause requirement for RICO claims pertaining to prescription drugs fraud. In *Sidney Hillman Health Center of Rochester v. Abbott Laboratories*,[20] TPPs that paid for beneficiaries' off-label use of seizure drugs brought a RICO claim against a drug manufacturer for its unlawful sales tactics, arguing that they were directly injured because they paid for most of the cost of the drugs.[21] However, the Seventh Circuit held that misrepresentations made to physicians don't support a RICO claim by the TPPs who were "several levels removed in the causation sequence" and not the initially injured parties.[22] In *UFCW Local 1776 v. Eli Lilly & Co.*,[23] the Second Circuit took the same approach as the Seventh Circuit. The TPPs alleged that the drug manufacturer's misrepresentation about the drug's efficacy and side effects resulted in higher price and greater demand for the drug, resulting in TPPs (1) paying for prescriptions that would not have been written but for the misrepresentation and (2) paying a higher price for the drug than they would have been charged absent the misrepresentation.[24] The court held that proximate cause could not be established for either theories of harm because of the independent actions of prescribing physicians, who may have relied on the misrepresentation to different degrees.[25]

In contrast, the First Circuit found proximate causation under similar facts in *In re Neurontin Marketing & Sales Practices Litigation*.[26] TPPs claimed that the drug manufacturers engaged in fraudulent marketing to doctors and TPPs, which influenced both formulary decisions and prescribing decisions, and misrepresented the drug's effectiveness for off-label uses.[27] The court found that TPPs satisfied the direct relationship test in *Holmes*, and that the causal chain was "anything but attenuated" because the drug manufacturers had always known that, "because of the

structure of the American health care system, physicians would not be the ones paying for the drugs they prescribed."[28] Notably, the court reasoned that the fact that some physicians may have based their prescribing decisions in part on factors other than the fraudulent marketing does not make the causal chain attenuated; this argument is only relevant to determining damages, but does not affect the question of proximate cause.[29] Similarly, in *In re Avandia Marketing, Sales Practices & Product Liability Litigation*,[30] the Third Circuit held that the conduct that allegedly caused the TPPs' injuries was the same conduct underlying the RICO scheme—the misrepresentation of risks associated with taking the drug—that caused TPPs to place the drug in the formulary. It further concluded that prescribing physicians did not suffer RICO injury from the fraudulent marketing, so the TPPs' economic injury was independent of any third parties who were injured.[31]

In *Painters*, the Ninth Circuit decided to take the same approach as the First and Third Circuits on the issue of proximate cause.[32] First, it found that the TPP's and patients' allegations satisfied the direct relation requirement stated in *Holmes*, as they were the immediate victims of the drug manufacturer's fraudulent scheme to conceal the risk of bladder cancer.[33] The court also found that the three *Holmes* factors weighed in favor of establishing proximate cause, as (1) it did not think that the calculation of damages would be so difficult that the plaintiffs should be denied the opportunity to prove their damages, (2) there was no concern of multiple recoveries because patients sought to recover only the amount they paid out-of-pocket, and (3) holding the defendants liable for the plaintiffs' alleged injuries would deter harmful conduct because they were the most direct victims suffering economic injury.[34]

Next, the Ninth Circuit analyzed the central issue between the Second and Seventh Circuits and the First and Third Circuits: "whether the decisions of prescribing physicians and pharmacy benefit managers constitute intervening causes that sever the chain of proximate cause between

the drug manufacturer and TPP."[35] It concluded that the First and Third Circuits' approach was more consistent with the Supreme Court's direct relation requirement, reasoning that prescribing physicians were not intervening causes because "it was perfectly foreseeable that physicians who prescribed [the drug] would play a causative role" in the defendants' allegedly fraudulent scheme.[36]

The Ninth Circuit correctly interpreted the direct relation requirement in holding that proximate cause was sufficiently established. In *Holmes*, the Supreme Court used the direct relation requirement to avoid the difficulties of distinguishing the amount of a plaintiff's damages attributable to the RICO violation from other independent factors.[37] Thus, the Court was concerned about the possibility of independent factors, such as the prescribing physicians and pharmacy benefit managers in *Painters*. But in *Painters*, as the Ninth Circuit noted, it is not so clear that the prescribing physicians are independent factors.[38] The Ninth Circuit correctly drew an analogy to *Bridge,* where proximate cause was established because the harm to the other bidders was a foreseeable consequence of the defendants' fraudulent scheme.[39] In the context of TPPs, foreseeability is important because it establishes that the defendants *intended* to cause economic injury to TPPs through their misrepresentation. Because Actos was a prescription drug, the defendants knew that the only way their alleged fraud could be carried out was through the actions of prescribing physicians.[40] The physicians were merely intermediaries that were necessary for the fraudulent scheme to work—they were not intended as the target of the alleged RICO violation because TPPs and patients were the parties that would inevitably suffer economic injury. The plaintiffs provided sufficient evidence that physicians lacked knowledge about the risk of the drug, and it was not the case that physicians deliberately prescribed the drug after learning about its risks.[41]

But even if prescribing physicians and pharmacy benefit managers are independent factors, they are not *substantial* factors that should break the causal chain.[42] In both *Holmes* and *Bridge,* the Court noted that proximate cause is a "flexible concept"[43] for which it is "virtually impossible to announce a black-letter rule that will dictate the result in every case."[44] The direct relation test is based on the assumption that the less direct an injury is, the more difficult it is to tell how much of a plaintiff's injury can be attributed to the RICO violation. But, in the context of pharmaceutical fraud, the direct relation test should not bar recovery when it is possible to tell how much of the economic injury to the patients and TPP stem from the drug manufacturers' fraudulent scheme. As the First Circuit noted in *Neurontin,* it is possible to use economic analysis and reasonable assumptions about alternative drugs that physicians would have prescribed absent the fraudulent misrepresentation.[45]

The *Holmes* Court may have wanted to bar recovery for harms that were too speculative and that could be due to any number of factors, but the nature and severity of the defendants' misrepresentation in *Painters* allowed for a reasonable assumption that physicians would have prescribed an alternative drug but for the alleged RICO violation, so the plaintiffs' economic injury was not speculative.[46] As the Ninth Circuit noted, there is an important difference between the fraudulent promotion of off-label uses in *Sidney Hillman* and *UFCW Local 1776* and the fraudulent failure to warn of a drug's known risk of causing bladder cancer in *Painters*: whereas it would be difficult to attribute which physicians' prescribing decisions were influenced by drug manufacturers' fraudulent promotion of off-label uses, it is more likely that knowing about a drug's risk of causing bladder cancer would materially influence physicians' prescribing decisions.[47] The Ninth Circuit correctly took a functional approach in its analysis of the *Holmes* factors, particularly in its recognition that calculation of damages was possible. A functional approach that does not

read too much into the literal requirement of a direct relation between the injury and the RICO violation is better for achieving the intended purpose of a proximate cause requirement.[48]

Rather than focusing on the difficulty of calculating damages as the Second and Seventh Circuits did,[49] the Ninth Circuit correctly focused on the purpose of the proximate cause requirement, noting that drug manufacturers should not be "insulated from liability" for their fraudulent conduct by hiding behind prescribing doctors.[50] Proximate cause is ultimately a policy question on how far to extend liability. The Second and Seventh Circuits' denial of standing to TPPs will have negative policy implications because it severely weakens the reach of the RICO statute, which is an important deterrent against drug manufacturers that engage in fraudulent marketing schemes.[51] By making it harder for TPPs to sue for pharmaceutical fraud, drug manufacturers will continue to engage in fraudulent marketing that harm multiple parties. The Ninth Circuit's interpretation of RICO's proximate cause requirement, on the other hand, recognizes a broader approach to the Supreme Court's direct causation test in which the foreseeability of harm can still be considered in imposing liability.[52] In opting for a broader interpretation, the Ninth Circuit has stayed true to the purpose of the RICO statute,[53] and has demonstrated how civil RICO can be used as a powerful tool against pharmaceutical fraud.[54]

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[1] 18 U.S.C. §§ 1961–1968.

[2] The statute lists approximately 150 predicate offenses deemed to be "racketeering activity" in 18 U.S.C. § 1961(1). Of particular relevance to this Case Comment are the predicate offenses of mail and wire fraud under 18 U.S.C. §§ 1341, 1343.

[3] *See* CHARLES DOYLE, CONG. RSCH. SERV., RL96-950, RICO: A BRIEF SKETCH 19–25 (2021) (explaining the elements of the civil RICO statute).

[4] *See infra* notes 15, 20 and accompanying text.

[5] 943 F.3d 1243 (9th Cir. 2019).

[6] *Id.* at 1246. The TPP, Painters and Allied Trades District Council 82 Health Care Fund, relies on its members to submit claims for drugs and expects that patients and prescribing physicians will make "informed decisions" about which drugs will be prescribed and submitted for reimbursement. *Id.* at 1247; *see also In re* Avandia Mktg., Sales Pracs. & Prod. Liab. Litig., 804 F.3d 633, 634–35 (3d Cir. 2015) (explaining how pharmacy benefit managers prepare TPPs' formularies of drugs approved for use by TPPs' members).

[7] The plaintiffs argued that despite learning of the increased risk of developing bladder cancer, the defendants refused to change the warning label on the drug or inform them of the risk. *Painters*, 943 F.3d at 1246.

[8] Patients claimed neither they nor their physicians knew about Actos's risk of bladder cancer when they began taking the drug and that they would never have submitted reimbursement claims for Actos to TPPs since they would never had purchased Actos. *Id.* at 1247.

[9] *Id.* at 1247–48.

[10] *Id.* at 1257.

[11] 503 U.S. 258 (1992).

[12] *Id.* at 266–68.

[13] *Id* at 269–70.

[14] *Id.*

[15] *Id*. The Court was concerned that a liberal construction of RICO, in which indirectly injured parties could recover, would open the door to "massive and complex damages litigation" that would burden the courts and undermine the effectiveness of treble-damages suits (quoting

Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 545 (1983)).

[16] 553 U.S. 639 (2008).

[17] *Id.* at 643–44 (2008).

[18] *Id.* at 648.

[19] *Id.* at 658.

[20] 873 F.3d 574 (7th Cir. 2017).

[21] *Id.* at 576.

[22] *Id.* at 578. The court noted several difficulties with calculating damages if the TPPs were to be given RICO standing: (1) not all off-label prescriptions were injurious to TPPs because they may have been beneficial to patients and cheaper than an alternative drug, (2) even in the absence of the drug manufacturer's misrepresentations, physicians may have written the same prescriptions anyways, and (3) physicians' prescribing practices may have been influenced by factors other than the drug manufacturer's misrepresentations. It rejected the TPPs' argument that the effects of the drug manufacturer's misrepresentations could be estimated using a regression analysis, suggesting that any estimate would be speculative. *Id.* at 577. *But see In re* Neurontin Mktg. & Sales Pracs. Litig., 712 F.3d 21 (1st Cir. 2013) (using economic analysis to find a causal connection between fraudulent marketing and quantity of prescriptions written for off-label indications).

[23] 620 F.3d 121 (2d Cir. 2010).

[24] *Id.* at 131.

[25] *Id.* at 136.

[26] 712 F.3d 21 (1st Cir. 2013).

[27] *Id.* at 28.

[28] *Id.* at 38.

[29] *Id.* at 39. One expert calculated the percentage of prescriptions caused by the fraudulent marketing: three out of ten prescriptions written by neurologists for migraine would not have been written but for the alleged misrepresentation. *Id.* at 30. Another expert calculated the damages number using a list of alternative drugs that were more appropriate for each off-label indication; the court accepted this method of damage calculation. *Id.* at 32.

[30] 804 F.3d 633, 644 (3d Cir. 2015).

[31] *Id.* Like the *Neurontin* court, the *Avandia* court noted that distinguishing the amount of damages attributable to the defendant's violation from other independent factors is a question of damages, not of proximate cause. *Id*.

[32] Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co., 943 F.3d 1243, 1257 (9th Cir. 2019).

[33] *Id.* at 1251.

[34] *Id*. In considering the difficulty of ascertaining damages, the court briefly noted that the plaintiffs had alleged there were at least three less expensive alternatives to Actos but that "[i]n any event, this is a damages question for another day." *Id.* at 1251 n.7.

[35] *Id.* at 1257.

[36] *Id.*

[37] Holmes v. Secs. Inv. Prot. Corp., 503 U.S. 258, 269 (1992).

[38] Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co., 943 F.3d 1243, 1257 (9th Cir. 2019).

[39] *Id.* at 1251. *But see* Hemi Grp., LLC v. City of New York, 559 U.S. 1, 12 (2010) ("Our precedents make clear that in the RICO context, the focus is on the directness of the relationship between the conduct and the harm… *Holmes* never even mentions the concept of foreseeability"); Randy D. Gordon, *RICO Had a Birthday! A Fifty-Year Retrospective of Questions Answered and Open*, 105 MARQ. L. REV. 131, 162 (2021) (noting that in *Hemi*, the foreseeability of the harm "proved insignificant").

[40] *Painters*, 943 F.3d at 1257; *see also* Simani M. Price et al., *What Influences Healthcare Providers' Prescribing Decisions? Results From a National Survey*, 17 RSCH. IN SOC. & ADMIN. PHARMACY 1770, 1770 (2021) (finding that contact with pharmaceutical industry was significantly associated with increased industry influence on providers' prescription decisions).

[41] *Compare Painters*, 943 F.3d at 1258 (survey showed that seventy-five percent of surveyed physicians' interest in another anti-diabetic drug declined greatly once they learned it carried a risk of bladder cancer), *and* Price et al., *supra* note 40, at 1777 (research indicates that physicians may genuinely lack understanding of what is promotion information and may not be able to distinguish promotional information and scientific evidence), *with* Sidney Hillman Health Ctr. of Rochester v. Abbott Lab'ys, 873 F.3d 574, 577 (7th Cir. 2017) (noting that some physicians were apt to write prescription whether or not the drug manufacturer promoted the drug for off-label uses).

[42] *See* Gordon, *supra* note 39, at 162 n.155 ("[T]he focus is on…whether the connection [between the conduct and the harm] is attenuated by substantial intervening factors or third party conduct." (quoting Doe v. Trump Corp., 385 F. Supp. 3d 265, 276 (S.D.N.Y. 2019))).

[43] Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 654 (2008).

[44] Holmes v. Secs. Inv. Prot. Corp., 503 U.S. 258, 272 n.20 (1992) (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 536 (1983)); *see also* Stephen Scallan, *Proximate Cause Under RICO*, 20 S. ILL. U. L.J. 455, 467 (1996) (arguing that the Court's directness test gives a broad reading to the phrase "direct injury"). *But see* Pamela Bucy Pierson, *RICO Trends: From Gangsters to Class Actions*, 65 S.C. L. REV. 213, 246 (2013) (arguing that *Holmes* created a "high and exacting burden" for plaintiffs to prove that their alleged injuries are directly caused by the alleged violation of RICO and that no other factors other than the RICO conduct contributed to their injury).

[45] *See supra* note 29. *But see* UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121, 135 (2d Cir. 2010) (noting the difficulty of attributing injury to the drug manufacturer's RICO conduct because of uncertainty about what the alternative prescriptions would have been and how they would have been distributed among the plaintiffs); Tracy Weber et al., *Medicare Drug Program Fails to Monitor Prescribers, Putting Seniors and Disabled at Risk*, PROPUBLICA (May 11, 2013, 4:06 PM), https://www.propublica.org/article/part-d-prescriber-checkup-mainbar (showing that some physicians still choose to prescribe a drug even after knowing about risks of harmful side effects).

[46] *See In re* Neurontin Mktg. & Sales Pracs. Litig., 712 F.3d 21, 49 (1st Cir. 2013) (noting that, even if assumptions of whether doctors would have prescribed lower-cost alternative drugs are speculative, "the burden of proof as to damages is lower than that for causation, and the factfinder is afforded a greater deal of freedom to estimate damages where the defendant, as here, has created the risk of uncertainty").

[47] Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co., 943 F.3d 1243, 1258 (9th Cir. 2019). Plaintiffs alleged that sales of Actos decreased approximately eighty

percent when the Food and Drug Administration issued an official warning on the risk of bladder cancer. *Id*.

[48] *See* Scallan, *supra* note 44, at 457, 460 (discussing the limitations of the direct relation test and arguing that, instead of using a foreseeability test, courts have "effectively denied litigants standing by using archaic proximate cause tests").

[49] *See supra* note 22.

[50] *Painters*, 943 F.3d at 1257.

[51] *See* Scallan, *supra* note 44, at 505 (arguing that "RICO damages…are set at too low a level to overdeter").

[52] *Painters*, 943 F.3d at 1257.

[53] *See* S. REP. NO. 91-617, at 79 (1969) (noting that civil RICO is "necessary to free the channels of commerce from all illicit activity").

[54] *See* Pierson, *supra* note 44, at 215, 257 (arguing that civil RICO is "an untapped resource" and that "the way is bright if insurers, either as a single plaintiff or in class actions, want to use RICO to sue pharmaceutical companies for fraudulent misrepresentations about covered drugs").

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June 12, 2023

The Honorable Juan R. Sanchez
United States District Court, Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
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Dear Chief Judge Sanchez:

I am writing to apply for a clerkship in your chambers that begins in 2024 or 2025. I am a rising third-year student at Harvard Law School and Executive Managing Editor of the *Harvard Civil Rights-Civil Liberties Law Review.* I plan to pursue a career in civil legal aid, and my interest in clerking stems from my desire to provide the best possible legal services to my future clients.

I am particularly interested in clerking in your chambers for several reasons. For one, your legal practice before becoming a judge closely mirrors what I hope to do. Further, I'd love to begin my career in Philadelphia. My late uncle, Phil Garber, practiced law in the city for 35 years. He inspired me to become a lawyer, and I would be honored to begin my legal career in the same place where he began his.

Enclosed are my resume, law school transcript, undergraduate transcript, and writing sample. You will be receiving letters of recommendation separately from Professor Emily Schulman, Professor Benjamin Sachs and Ms. Helene Lerner. All three welcome any inquiries.

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My work with the New York Legal Assistance Group's Employment Law Unit and the Harvard Housing Law Clinic have provided me with meaningful legal research and writing experiences at the trial court level. With both opportunities, I prepared several briefs on behalf of indigent clients. I have further strengthened my legal writing, research, and editing skills through my work with the *Harvard Civil Rights-Civil Liberties Law Review*.

If there is any additional information that would be helpful, I would be happy to provide it. Thank you for your time and consideration.

Sincerely,

Andrew Young

Andrew Young

1600 Massachusetts Ave., Apt. 505, Cambridge, MA 02138 | ayoung@jd24.law.harvard.edu | 203-536-9712

EDUCATION

Harvard Law School, Cambridge, MA
Candidate for J.D., May 2024
Activities: *Harvard Civil Rights-Civil Liberties Law Review*, Executive Managing Editor
Labor and Employment Action Project
Housing Law Clinic and Tenant Advocacy Project

Cornell University, Ithaca, NY
B.S. in Industrial and Labor Relations with Honors, May 2020
Honors: Daniel Alpern Senior Award for scholarship, leadership, and service to Cornell
Activities: Ellis IDEA Lab, Senior Researcher
Hillel, Engagement Fellow
Honors Thesis: "Minor League Squeeze: An Analysis of Structural Injustice in Minor League Baseball"

EXPERIENCE

Outten & Golden LLP, New York, NY
Law Clerk, Summer 2023
- Anticipating work on employee-side whistleblower, discrimination, ERISA, and class action litigation

New York Legal Assistance Group, New York, NY (Remote)
Law Clerk, Employment Law Unit, Fall 2022
- Drafted briefs and conducted legal research for wage theft and discrimination cases for low-wage workers
- Engaged with clients at all stages of litigation

National Labor Relations Board, Washington, D.C.
Legal Intern, Contempt, Compliance, and Special Litigation Branch, Summer 2022
- Devised legal strategies to combat Seventh Amendment challenges to the administrative state
- Conducted research on compliance with NLRB orders in preparation for upcoming district court trials

Stamford Public Schools, Stamford, CT
Middle School Teacher, Winter-Spring 2021
- Prepared and taught introductory language lessons to 90 middle school students

Pennsylvania Democratic Party, Erie County, PA
Field Organizer, Summer-Fall 2020
- Managed more than 80 volunteers in phone banking and voter persuasion conversations
- Researched policy and crafted talking points for local Pennsylvania candidates

United Kingdom Parliament, London, England
Hansard Scholar, Treasury-Select Committee, Spring 2019
- Evaluated and scrutinized policy regarding access to financial services for the United Kingdom after "Brexit"
- Worked with Members of Parliament and staff to research and prepare 12 briefings for Treasury-related inquiries

Southern African Institute for Policy and Research, Lusaka, Zambia
Legal Researcher, Summer 2018
- Drafted and published "Harm and Harmonization: Gender-Based Violence and Zambia's Dual Legal System"

New York Center for Law and Justice, New York, NY
Legal Intern, Summer 2017
- Drafted briefs to promote reasonable accommodations in NYC's public services for people with disabilities

INTERESTS

- Avid fan of Syracuse University basketball and New York Mets baseball
- Amateur chef, particularly interested in vegetarian dishes

Harvard Law School

Date of Issue: May 26, 2023
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Record of: Andrew Young
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 2 Greiner, D. James	H	4
1001	Contracts 2 Kennedy, Randall	P	4
1006	First Year Legal Research and Writing 2A Gallogly, Owen	H	2
1003	Legislation and Regulation 2 Freeman, Jody	P	4
1004	Property 2 Mann, Bruce	H	4
	Fall 2021 Total Credits:		18

Winter 2022 Term: January 04 - January 21

1054	Advocacy: The Courtroom and Beyond Gershengorn, Ara	CR	2
	Winter 2022 Total Credits:		2

Spring 2022 Term: February 01 - May 13

1024	Constitutional Law 2 Jackson, Vicki	P	4
1002	Criminal Law 2 Lanni, Adriaan	P	4
1006	First Year Legal Research and Writing 2A Gallogly, Owen	H	2
2237	The Role of the State Attorney General Tierney, James	H	2
1005	Torts 2 Davis, Seth	P	4
	Spring 2022 Total Credits:		16
	Total 2021-2022 Credits:		36

Fall 2022 Term: September 01 - December 31

3196	(Jewish) Law and Story Segal, Miryam	CR	1
2079	Evidence Schulman, Emily	P	4
2142	Labor Law Sachs, Benjamin	P	4
2146	Law and Economics Kaplow, Louis	P	2
3141	The Judicial Role in a Democracy Abella, Rosalie Silberman	H	2
	Fall 2022 Total Credits:		13

Winter 2023 Term: January 01 - January 31

2249	Trial Advocacy Workshop Sullivan, Ronald	CR	3
	Winter 2023 Total Credits:		3

Spring 2023 Term: February 01 - May 31

2651	Civil Rights Litigation Michelman, Scott	P	3
3094	Climate Change and the Politics of International Law Orford, Anne	P	3
2659	ERISA Rosenberg, Peter	H	2
8034	Housing Law Clinic Devanthery, Julia	H	3
2199	Housing Law Clinical Workshop Devanthery, Julia	H	2
	Spring 2023 Total Credits:		13
	Total 2022-2023 Credits:		29

Fall 2023 Term: August 30 - December 15

2035	Constitutional Law: First Amendment Weinrib, Laura	~	4
3218	Debt, Discrimination, and Inequality Atkinson, Abbye	~	1
2069	Employment Law Sachs, Benjamin	~	4
2169	Legal Profession Yoon, Albert	~	4
2067	Organizing for Economic Justice in the New Economy Block, Sharon	~	2
	Fall 2023 Total Credits:		15

Spring 2024 Term: January 22 - May 10

2048	Corporations Ramseyer, J. Mark	~	4

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Harvard Law School

Record of: Andrew Young

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2086	Federal Courts and the Federal System Fallon, Richard	~	5
		Spring 2024 Total Credits:	9
		Total 2023-2024 Credits:	24
		Total JD Program Credits:	89

End of official record

HARVARD LAW SCHOOL
Office of the Registrar
1585 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4612
www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

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In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

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A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems
Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)
Magna cum laude Next 10% of the total class following *summa* recipients
Cum laude Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing this letter in support of Andrew Young's application for a clerkship in your chambers. Andrew was a student in my Evidence class at Harvard Law School in the fall of 2022, and we had many conversations outside of class about Evidence, his legal studies and career goals, and many other topics, both personal and professional. Andrew's intellectual rigor, personal integrity, and enthusiasm for his work were abundantly clear throughout the semester. I highly recommend him for a clerkship in your chambers.

Andrew is a highly talented, motivated, and accomplished individual whose dedication to his work is unmistakable. He readily grasps black letter law and enjoys grappling with complex legal issues, both theoretical and practical. His intellectual curiosity and rigor impel him to critically examine the competing considerations in any given case and to devise a thoughtful, well-reasoned analysis of how they should be resolved. While he can more than hold his own in doctrinal debates, he does not regard law as an intellectual abstraction. Instead, he embraces it as a vital tool for public service and a means by which he can serve the greater good.

Andrew has made it his personal mission to work on behalf of the most disadvantaged among us. His grandfather, who was a public defender for more half a century, and his uncle, who was a legal aid lawyer for more than three decades, are important role models for him in that regard. He is eager and honored to continue that family legacy.

Andrew is dedicated to cultivating the foundational skills and breadth of experience that will enable him to advocate most effectively for the underserved and make a positive difference in the world. Toward that end, he has immersed himself in challenging, doctrinal coursework and applied those teachings in practice through his work in Harvard's Housing Law Clinic. In one of his cases, Andrew's client was facing imminent eviction and had already defaulted on the case by the time it was assigned to Andrew. Through his motions practice, he succeeded in staying the eviction proceedings and persuading the court to remove his client's default. Andrew then advocated for and negotiated a Reasonable Accommodation Plan for his client in light of her disability. Thanks to Andrew's efforts and legal acumen, his client was able to remain in her home.

Andrew has married his commitment to social justice with the development of his legal skills through his work on the Harvard Civil Rights-Civil Liberties Law Review ("CR-CL"), where he serves as Executive Managing Editor. The many hours he has devoted to CR-CL have sharpened his critical thinking skills and refined his legal writing while advancing legal scholarship about civil rights and social justice issues.

Dispositionally, Andrew is well-suited to a clerkship setting. He carries himself with an earnestness and humility that draws others to him. He is genuinely interested in others' opinions and perspectives and integrates those views into his own understanding of the law. He is unfailingly respectful and considerate of others and readily forges positive and productive relationships with those around him.

Andrew's understated manner belies the intellectual rigor and determination with which he approaches his work. He is eager to deepen his understanding of the law and the administration of justice, to hone his litigation skills, and to harness those skills and understanding to promote social justice. He relishes the opportunity to work closely with an experienced judge and to absorb the perspective and insights a judge could offer about legal advocacy and our justice system overall.

In sum, I believe Andrew would be a welcome and valuable addition to your chambers.
Please do not hesitate to contact me if I can be of any further assistance.

Sincerely,

Emily R. Schulman

Emily Schulman - eschulman@law.harvard.edu - 617-526-6077

June 06, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I write on behalf of Andrew Young, a rising third-year student at Harvard Law School, who has applied for a clerkship in your chambers. Mr. Young has been a student in two of my courses, and has done well in both. I have no doubt that Mr. Young will make an outstanding law clerk and I recommend him highly.

I first met Mr. Young when he was a student in my 1L reading group, The Struggle for Workers' Rights on Film. This course is a relatively informal small-group class taught in the early months of a student's time at the law school. My course uses a series of movies to explore basic themes in labor movement history and labor law. Mr. Young impressed me as someone who was willing to engage with the complex issues presented by the films and someone capable of participating productively and meaningfully in difficult debates. As a graduate of Cornell's Industrial and Labor Relations program, he brought significant knowledge to bear on these debates and contributed that knowledge in an impressive and productive way.

During the Fall 2022 semester, Mr. Young was a student in my Labor Law class. Labor Law is a large, black-letter law class taught in the Socratic style. When Mr. Young took Labor Law there were approximately 90 students in the class, and Mr. Young was among the leaders in our class discussions. He was thoroughly prepared for every class session and was an eager participant in class debates, again contributing insight in an effective and congenial manner. I remember in particular his comments regarding whether – in a real-world example – Starbucks could legally give raises to its employees in its non-unionized stores while withholding raises from employees at its unionized stores, in light of Exchange Parts and Katz. Mr. Young also wrote a strong exam, displaying a command of the material in the course, and earning a P grade for the semester.

Finally, I have had the opportunity to get to know Mr. Young through office hours visits and some career advising. In addition to being an excellent law student, Mr. Young is a pleasure to know and work with. He is thoughtful and engaging, and brings a genuine enthusiasm to his studies that would make him a welcome addition to any chambers.

Thank you for your attention to Mr. Young's application. I would be happy to discuss it further.

Sincerely,

Benjamin Sachs

Benjamin Sachs - bsachs@law.harvard.edu - 617-384-5984